Supreme Court, U.S.
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No.

In the Supreme Court of the United States

GOVERNMENT OF TURKMENISTAN,

Petitioner,

v.

BRIDAS S.A.P.I.C., BRIDAS ENERGY INTERNATIONAL, LTD., INTERCONTINENTAL OIL & GAS VENTURES, LTD., AND BRIDAS CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) ("*Bancec*"), this Court held that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." The Court also recognized an exception to that presumption in cases of "injustice." The Court found that exception applicable in *Bancec* to prevent a foreign state from reaping "the benefits of our courts while avoiding the obligations of international law." *Id.* at 633-634. In this case, the Fifth Circuit extended the *Bancec* "injustice" exception by imposing on the Government of Turkmenistan an arbitration agreement executed solely by its instrumentality with respondents. Accordingly, although the Government had never agreed to arbitrate, the Fifth Circuit upheld a hotly disputed $445 million arbitral award in favor of respondents against the Government. The questions presented are as follows:

1. Whether, in conflict with other courts of appeals, the Fifth Circuit improperly expanded the scope of the "injustice" exception to the *Bancec* presumption of independence.

2. Whether, contrary to *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985), the Fifth Circuit improperly resolved a disputed fact issue not addressed by the district court by finding that the Government deprived respondents of the ability to enforce an arbitral award against its instrumentality.

3. Whether the arbitral damages award should be vacated for manifest disregard of the law where the arbitrators' use of an interest rate designated for short-term loans to discount 25 years of uncertain profits inflated damages by $200 million.

RULE 14.1(b) STATEMENT

A list of the parties to the proceeding in the court of appeals is as follows:

Plaintiffs-Appellants: Bridas S.A.P.I.C.; Bridas Energy International, Ltd.; Intercontinental Oil & Gas Ventures, Ltd.; and Bridas Corporation.

Defendants-Appellees: Government of Turkmenistan; Concern Balkannebitgazsenagat; and State Concern Turkmenneft.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Government of Turkmenistan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 447 F.3d 411. The order of the court of appeals denying petitioner's petitions for panel rehearing and for rehearing en banc (App., *infra*, 46a-47a) is unreported. The opinion of the district court (App., *infra*, 15a-45a) is unreported. A prior decision by the court of appeals in this matter is reported at 345 F.3d 347.

JURISDICTION

The court of appeals entered judgment on April 21, 2006. Petitioner Government of Turkmenistan's timely petitions for panel rehearing and for rehearing en banc were denied on May 22, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Factual Background. The court below held that the Government of Turkmenistan ("Government"), which was not a signatory to a 1993 Joint Venture Agreement ("JVA") between the Government's independent instrumentality and respondents, was bound by the JVA's arbitration provision as the alter ego of its instrumentality. As a result, the court upheld a $445 million arbitral award against both the instrumentality and the Government, although the latter had never agreed to arbitrate any disputes with respondents.[1]

[1] The arbitrators offset the $495 million initially awarded to Bridas by $50 million due to Bridas' failure to mitigate its damages, resulting in a net award of $445 million against the Government

The JVA, which established a joint venture to exploit oil and gas resources in southwestern Turkmenistan, provided for arbitration of any dispute between "the Parties." R.9842. The JVA defined "the Parties" as the "Foreign Party" (respondents, collectively "Bridas") and the "Turkmenian Party" (initially Production Association Turkmenneft). R.9880. The Government was not a signatory or party to the JVA. Instead, at respondents' request, the Government provided a separate letter that "fully and completely guaranteed" the joint venture's right to conduct its operations as set forth in the joint venture documents. R.7430. That guaranty did not contain or reference any arbitration provision.

The JVA specified that the Turkmenian Party was "a legal entity within the meaning of the laws of Turkmenistan" and authorized it to transfer its obligations and rights to successor entities "appointed by the Government." R.9880, 9834. As the JVA contemplated, the Government periodically redesignated the Turkmenian Party over the life of the joint venture, culminating in a July 1996 restructuring that established State Concern Turkmenneft ("Turkmenneft") as the Turkmenian Party. Under Turkmenian law, a state enterprise like Turkmenneft is juridically independent, is authorized to enter into contracts, may sue and be sued, and bears responsibility for its own obligations and liabilities. See R.9568, 9880.

In November 1995, after relations between respondents, the Government, and Turkmenneft had deteriorated, the Government banned oil exports and suspended the joint venture's operations. App., *infra*, 3a.

Arbitral Proceedings. In April 1996, respondents filed arbitration claims against Turkmenneft and the Government, seeking a declaration that obligations under the JVA remained

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and its instrumentality. An additional amount was awarded against the instrumentality alone.

in force or, alternatively, damages for breach of contract. The Government filed a jurisdictional objection, contending that it was not bound by an arbitration agreement to which it was not a party, and did not further participate in the arbitration, which took place in Houston.

Although the arbitral tribunal recognized that the "Government was neither a named party nor a signatory to the JV Agreement," it ruled 2-1 that the JVA bound the Government to arbitrate on the ground that the JVA contained commitments that only the Government could satisfy. R.9781. The tribunal proceeded to rule (again 2-1) that Turkmenneft and the Government had repudiated the JVA, and it awarded respondents $445 million dollars plus interest. App., *infra*, 4a.

Federal Court Proceedings. Bridas moved to confirm the award and, in response, the Government and Turkmenneft each moved to vacate it. In the initial district court proceeding, the court held that the Government was bound to arbitrate based on agency and estoppel theories and upheld the award against both the Government and Turkmenneft. The Fifth Circuit rejected the agency and estoppel theories, vacated the ruling with respect to the Government, and remanded to determine whether the Government was bound to arbitrate as Turkmenneft's alter ego. 345 F.3d 347 (5th Cir. 2003) (*Bridas I*). The court expressly held that the separate Government guaranty was not part of the JVA and not subject to arbitration. *Id.* at 356-357 & n.8. The court also upheld the award against Turkmenneft, relying on the "high degree of deference" afforded arbitrators' decisions. *Id.* at 365-366. On remand, the district court vacated the award against the Government, ruling that "State Concern Turkmenneft is not the alter ego of the Government of Turkmenistan" and therefore that "piercing the corporate veil is not warranted." App., *infra*, 15a. The court of appeals reversed. *Id.* at 1a-14a (*Bridas II*).

In *Bridas II*, the court of appeals held that, despite the Government's non-party status with respect to the JVA and lack of an agreement to arbitrate with Bridas, it was bound to arbitrate as Turkmenneft's alter ego. The court recognized that, pursuant to *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) ("*Bancec*"), Bridas had to demonstrate a "fraud or injustice" to pierce the veil separating Turkmenneft from the Government. App., *infra*, 6a-7a. The court concluded that the Government's 1995 export ban was an exercise of its sovereign control over Turkmenistan's borders and not an abuse of the corporate form resulting in fraud or injustice. *Id.* at 7a. However, the court held that the Government's 1996 designation of Turkmenneft as the Turkmenian Party constituted the requisite injustice. *Id.* at 8a. The court based that holding on its finding that Turkmenneft was financially incapable of complying with "any substantial damage award." *Ibid.* The district court had made no such finding and had not even addressed Turkmenneft's capacity to satisfy any damage award, and Bridas had offered no evidence that it had tried and failed to collect the awarded damages from Turkmenneft.

REASONS FOR GRANTING THE PETITION

In *Bancec*, this Court articulated a presumption that government instrumentalities are separate and independent from the governments that duly created them. It also set forth exceptions to that presumption in cases of agency and of fraud or injustice. After finding the agency exception inapplicable to this case in *Bridas I*, the Fifth Circuit held in *Bridas II* that the Government's 1996 reorganization of the Turkmenian Party constituted an injustice that overrides the *Bancec* presumption and justifies imposing on the Government an arbitration provision executed three years earlier by the Turkmenian Party with respondents. That ruling conflicts with rulings of other courts of appeals which have narrowly construed the *Bancec* injustice exception and limited its applicability to cases involving an inequitable misuse of

U.S. courts and violations of international law or legislative policy.

No court previously has extended the *Bancec* injustice exception to require a foreign state to arbitrate as a remedy for a supposed injustice where the state had never agreed to arbitrate. The ruling below conflicts with the consensual basis of arbitration, as set forth in this Court's precedents. The Fifth Circuit's rationale for retroactively imposing Turkmenneft's arbitration obligation on the Government—Turkmenneft's supposedly thin capitalization and financial dependence on the Government—would justify piercing the veil separating most state enterprises from their governments, rendering the *Bancec* presumption devoid of any significance. And even if the Government had deprived respondents of the ability to enforce their award against Turkmenneft, as the Fifth Circuit found (though without record support, see Part III, *infra*), there was no need to impose Turkmenneft's arbitration obligation on the Government because respondents could have sued the Government to seek recovery under its separate guaranty.

The ruling below risks undermining a critical pillar of the established legal framework for promoting and protecting global investment. As this Court recognized in *Bancec*, private companies and foreign governments depend on the ability to structure joint ventures and other contractual relationships through independent state enterprises. Such enterprises enable governments to avoid a waiver of sovereign immunity and of vital procedural rights unavailable in arbitration, including a substantive appeal. They also enable contracting companies to avoid resolution of disputes and the sovereign immunity defense in the foreign state's courts by instead agreeing to arbitrate with the independent state enterprise. This Court should grant review to ensure that U.S. courts do not destabilize this cornerstone of transnational trade and investment.

As noted above, the Fifth Circuit based its injustice and alter ego rulings on the "fact" that the Government depleted the Turkmenian Party of assets when it established Turkmenneft in 1996. But neither the arbitral tribunal nor the district court ever addressed that issue, and courts of appeals are precluded from engaging in *de novo* factfinding by Rule 52 of the Federal Rules of Civil Procedure and this Court's precedents. Because the Fifth Circuit's factual determination was critical to a ruling that imposed a $445 million arbitral award on a nonsignatory state and risks undermining both federal arbitration law and a widespread means of facilitating global development, the Court should grant review to ensure that federal appellate courts do not engage in such improper factfinding.

Finally, the Government requests review of the Fifth Circuit's ruling in *Bridas I*, which is now encompassed in a final judgment, that the arbitrators did not manifestly disregard the law by using a legally impermissible discount rate to award damages far in excess of actual injury. The courts of appeals are deeply divided over the meaning and scope of the manifest disregard standard, a division over an important issue of federal law that only this Court can resolve.

I. THE RULING BELOW CONFLICTS WITH RULINGS OF OTHER COURTS OF APPEALS OVER THE PROPER SCOPE OF THE *BANCEC* "INJUSTICE" EXCEPTION.

A. The *Bancec* Presumption Of Independence And Exception For "Injustice"

The Fifth Circuit's ruling deviates from rulings of other courts of appeals on the scope of the injustice exception to the presumptive independence of state-owned enterprises. Both the presumption and exception are explained at length in *Bancec*.

In *Bancec*, Cuba's foreign trade bank (Bancec) sought to collect on a letter of credit issued by Citibank. Shortly thereafter, the Cuban government seized and nationalized Citibank's Cuban assets in violation of international law. After Bancec sued in U.S. district court to collect on the letter of credit, it was dissolved and its capital split among Cuba's central bank (Banco Nacional) and foreign trade entities of Cuba's Ministry of Foreign Trade. In the district court action, Citibank counterclaimed for an equitable setoff equal to the value of its expropriated assets. 462 U.S. at 614-616. The district court ruled in favor of Citibank on the ground that Bancec was the Cuban government's alter ego. *Id.* at 618. The Second Circuit reversed, holding that Bancec was not the Cuban government's alter ego. *Id.* at 618-619. This Court reversed.

Cautioning that "worn epithets" like "alter ego" and "mere instrumentality" provide no "substitute for rigorous analysis" (462 U.S. at 623), the Court began its analysis by describing the purpose of independent state enterprises. In particular, the Court explained, "developing countries * * * establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments." *Id.* at 625. The "[s]eparate legal personality" of these instrumentalities is "indispensable" because it "enabl[es] third parties to deal with the instrumentality knowing that they may seek relief in the courts" without fear of running into the sovereign immunity defense that states often assert. *Ibid.* On the assumption that these instrumentalities are legally independent of the governments that establish them, "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Id.* at 626. Because of the harm that would result from frustrating "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration," the Court concluded that "instrumentalities established as

juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

Based on that analysis, the Court crafted a presumption to guide the lower courts: "[D]uly created instrumentalities of a foreign state are to be accorded a presumption of independent status." 462 U.S. at 627. In addition, the Court recognized that this presumption may be overcome where (i) an entity is "so extensively controlled by its owner that a relationship of principal and agent is created," or (ii) upholding independent status "would work fraud or injustice." *Id.* at 629. The Court added, with respect to the injustice exception, that it had "consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *Id.* at 630.

The Court found that the "injustice" exception applied in the circumstances present in *Bancec* and therefore upheld Citibank's requested setoff. Those circumstances involved "a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery." 462 U.S. at 632. The Court explained that its decision sought "to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." *Id.* at 633-634.

Bancec thus makes clear that the injustice exception applies when a foreign state that stands in the shoes of a dissolved state enterprise seeks to obtain benefits from a U.S. court while seeking to avoid its obligations under international law.[2] In such circumstances, the Court held, an

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[2] See *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1560 (D.C. Cir. 1984) (Scalia, J., dissenting) ("what [*Bancec* and *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703 (1974)] stand for is that on some occasions (not 'consistently'), when an independent source of law indicates that this is the proper course of action, a court will prevent a corporation from pressing a claim against a third party which

equitable setoff may be imposed. The Court also suggested that corporate separateness may not be used to defeat legislative policies. *Bancec* does *not* address, however, whether the injustice exception applies where the state enterprise remains an active juridical entity, where the alleged injustice involves only a contract breach and not a violation of international law, where the foreign government does not seek benefits from a U.S. court, or where an equitable setoff is not requested. In addition, as particularly relevant here, *Bancec* does not address whether the injustice exception permits a U.S. court, as a remedy for a perceived injustice, to require a foreign state to arbitrate and thereby forfeit vital procedural rights based on an arbitration agreement to which a state enterprise, but not the state itself, was a party. As shown below, the lower federal courts require this Court's guidance on the scope of the *Bancec* injustice exception.

B. The Fifth Circuit Has Created A Circuit Conflict Over The Scope Of The Injustice Exception.

The Fifth Circuit's ruling that the Government and Turkmenneft are alter egos—because the Government's designation of Turkmenneft as the Turkmenian Party purportedly left Bridas without a contractual remedy (App., *infra*, 9a, 16a)—conflicts with rulings of other courts of appeals refusing to extend the *Bancec* injustice exception to cases involving mere contract breaches or other commercial harms. Instead, consistent with *Bancec* (462 U.S. at 630, 633-634), several circuits require a violation of international law or a legislative policy of the United States. In addition, some circuits, also consistent with *Bancec* (*id.* at 633-634) and contrary to the Fifth Circuit, apply the injustice exception only where the party seeking the benefit of the presumption of

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would inure to the benefit of an individual shareholder who would himself be barred from asserting it"), vacated and remanded, 471 U.S. 1113 (1985).

independence has demanded monetary relief from a U.S. court but raised the corporate shield as a defense to monetary claims against its parent. Some circuits additionally have rejected the notion, central to the Fifth Circuit's ruling, that a government's financial control over its instrumentality or its conduct potentially impeding collectibility qualifies as injustice within the meaning of *Bancec*.

In *Banco Nacional de Cuba* v. *Chemical Bank N.Y. Trust Co.*, 782 F.2d 377 (2d Cir. 1986), which was specifically decided "in light of the Supreme Court's decision in *Bancec*" (*id.* at 379), Cuba's national bank sued to recover funds it had deposited with Chemical. In response, Chemical sought a setoff based on a debt it was owed by Cuban Electric on the theory that Cuba was the alter ego of its national bank and had assumed Cuban Electric's debt by expropriating its assets. *Ibid.* After Chemical prevailed in the district court, the Second Circuit reversed, explaining that "[t]he record does not indicate that any of the key factors pointed to in *Bancec* exist with respect to Chemical." *Id.* at 380. Among other things, there had been no ruling that, as in *Bancec*, Cuba's actions "violated international law" or that the same entity that was pursuing a claim in a U.S. court was obligated to pay the debt to Chemical. *Ibid.*

In adhering to the *Bancec* focus on "the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law" (462 U.S. at 633-634), the Second Circuit refused to apply the injustice exception merely because denial of the setoff sought by Chemical would be "unfair." *Chemical Bank*, 782 F.2d at 380. In particular, the court rejected Chemical's contention that it would be unjust to permit the Cuban government, which had refused to pay the debts of Cuban Electric after seizing its assets, to benefit from its instrumentality's success in recovering funds from Citibank. The court explained that it would be inconsistent with *Bancec* to construe the injustice exception so broadly. *Ibid.*

The Second Circuit reiterated its narrow construction of the injustice exception in *Zappia Middle E. Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000). In *Zappia*, the plaintiff alleged that its property had been taken in violation of international law by a foreign government, the government's wholly owned investment institution, and its majority-owned commercial bank. *Id.* at 249. In affirming dismissal of the complaint, the Second Circuit rejected the plaintiff's position that the institution and bank were the government's alter egos. The court held that the plaintiff had not overcome *Bancec*'s "strong" presumption that government instrumentalities are "distinct and independent from their sovereign." *Id.* at 251-252. The court explained that the injustice exception does not apply where a "government, acting as a commercial entity, reneged on its contractual obligations," noting that a "breach of a commercial contract alone" does not violate "international law." *Id.* at 252. As in *Chemical Bank* and contrary to the Fifth Circuit's ruling in this case, the Second Circuit refused to extend the *Bancec* injustice exception to mere commercial harms.

On much the same basis, the ruling below also conflicts with the D.C. Circuit's decision in *TransAmerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000). In *TransAmerica*, the plaintiffs had leased equipment to CAVN, a shipping company owned by Venezuela before the company went bankrupt. Plaintiffs sued Venezuela and "an instrumentality of the Venezuelan government," alleging that they were liable for CAVN's breaches of contract for failure to provide CAVN with "the financial resources and the basic tools necessary to run a commercial shipping line and to perform its contracts with and commitments to the plaintiffs." *Id.* at 845-846, 854. The D.C. Circuit held that such commercial breaches were insufficient to defeat the *Bancec* presumption of separateness, noting as well that Venezuela

had not used CAVN "to defeat any statutory policy of either Venezuela or the United States." *Id.* at 854.

In accord with the Second Circuit's *Chemical Bank* decision, *supra* p. 10, and contrary to the Fifth Circuit's ruling below, other courts of appeals have interpreted *Bancec* to require an inequitable and affirmative use of U.S. courts by the party denied the presumption. See *Bancec*, 462 U.S. at 633-634. For example, in *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1067 (9th Cir. 2002), the plaintiff, who had obtained a default judgment against the Iranian government for a terrorist attack that killed his child, tried to enforce his judgment in federal court by levying against property owned by a nationalized Iranian bank. The district court's reasons for denying relief included the fact that, unlike in *Bancec*, the Iranian bank was "not attempting to use a United States court to recover on a claim while at the same time trying to avoid being the subject of an adversary proceeding." *Id.* at 1072. The Ninth Circuit affirmed, explaining that the district court's "thorough, well-reasoned opinion" had correctly resolved this matter "under the threshold *Bancec* liability inquiry." *Id.* at 1071-1072. That conclusion conflicts with the Fifth Circuit's ruling here, which applied the injustice exception without engaging in that "threshold" inquiry.

The Third Circuit also has stressed the importance of the misuse-of-the-courts inquiry. In *Federal Ins. Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270, 1278 (3d Cir. 1993), the district court had relied on *Bancec* in "piercing the corporate veil" separating ABP, an instrumentality of the Dutch government, from U.S. subsidiaries on the ground that "the benefits received by ABP from its subsidiaries' real estate investments [were] similar to the benefits a foreign state would receive from bringing a suit in the United States." *Id.* at 1290 n.16. The Third Circuit reversed, reasoning that the district court's rationale was not "consistent with *Bancec*." *Ibid.* According to the Third Circuit, "[u]nlike Cuba in the *Bancec* case, the Netherlands is not engaged in any related litigation in the

United States as a plaintiff [and] a commercial transaction [is] completely different from filing suit in the U.S. to seek a remedy." *Ibid.* The court of appeals called the district court's ruling "an extension of the *Bancec* [injustice] rationale that is not principled [and] without support in the case law." *Ibid.* That conclusion would apply as well to the Fifth Circuit's ruling in this case which, like the district court in *Federal Insurance*, overrode the *Bancec* presumption of independence where there was no comparable misuse of our courts by a foreign state.[3]

Finally, the Fifth Circuit's ruling that the Government committed the requisite injustice by supposedly undercapitalizing Turkmenneft to prevent Bridas from enforcing its arbitration award (App., *infra*, 8a) conflicts with the Eleventh Circuit's decision in *Alejandre* v. *Telefonica Larga Distancia, Inc.*, 183 F.3d 1277 (11th Cir. 1999). In *Alejandre*, the plaintiffs sought to collect on judgments against the Cuban government and Cuban Air Force by garnishing debts that private companies owed to ETECSA, a Cuban telecommunications company that was majority owned by Cuban companies that in turn were owned or controlled by the Cuban government. *Id.* at 1278-1279, 1281. The Eleventh Circuit vacated the district court's garnishment order, explaining that the court should not have disregarded "the presumptively separate juridical status of ETECSA" by invoking *Bancec*'s injustice exception. *Id.* at 1286. In

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[3] The Fifth Circuit did not suggest that the Government's motion to vacate the arbitration award constituted such an inequitable use of U.S. courts. Nor could it plausibly have done so. The "injustice" relied on by the Fifth Circuit occurred in 1996. The Government's motion to vacate came three years later and in response to Bridas' motion to confirm the award. See *Bridas I*, 345 F.3d at 361 (the Government "never sued Bridas"); App., *infra*, 27a ("The Government has neither attempted to use the U.S. Courts through its subsidiary nor has it asserted sovereign immunity to avoid any counterclaims").

particular, the court of appeals rejected as insufficient "concern about the injustice of preventing plaintiffs from collecting their judgment." *Ibid.* The court explained that such uncollectibility "is not the type of injustice that concerned the *Bancec* Court" because such a concern "is present in every case in which a plaintiff seeks to hold an instrumentality responsible for the debts of its related government." *Id.* at 1286-1287 & n.22. See also *Ministry of Defense of Islamic Republic of Iran* v. *Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) ("inability to collect does not, by itself, constitute an inequitable result"); *Flatow*, 308 F.3d at 1073 (Iran's ownership of bank's capital did not preclude bank from being treated as "a separate juridical entity under *Bancec*"). The Eleventh Circuit added that ETECSA had not been involved in any violation of international law. 183 F.3d at 1287.

In each of these cases, the courts of appeals construed the *Bancec* "injustice" exception narrowly to avoid allowing the exception to swallow up the presumption. As the Eleventh Circuit put it in rejecting the plaintiffs' uncollectibility argument in *Alejandre*, "[a]llowing the *Bancec* presumption of separate juridical status to be so easily overcome would effectively render it a nullity." 183 F.3d at 1287; see also *Letelier* v. *Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (*Bancec* "caution[s] against too easily overcoming the presumption of separateness").

In contrast, the Fifth Circuit overrode the *Bancec* presumption based on an expansive view that mere contract breaches causing merely commercial losses may constitute the requisite "injustice"—with no requirement that international law or legislative policy be violated or that U.S. courts be misused. Even if the Government had appointed a Turkmenian Party that could not fulfill its financial JVA obligations, as the Fifth Circuit assumed (improperly as shown in Part III, *infra*), that at most would constitute a breach of the Government's operational guaranty. As the D.C. Circuit pointed out in *TransAmerica*, 200 F.3d at 854, a

foreign government's failure "to perform its contracts [and] commitments" is not what *Bancec* meant by "injustice." This Court's review is required both to resolve this conflict over the proper construction of the *Bancec* injustice exception and to provide guidance to the lower courts on the important issues of federal arbitration law discussed in Part II.

II. THE COURT OF APPEALS IMPROPERLY FORCED THE GOVERNMENT TO ARBITRATE WITHOUT ITS CONSENT AS A REMEDY FOR A PERCEIVED INJUSTICE.

A. The Fifth Circuit's Ruling Conflicts With The Consensual Basis Of Arbitration.

As explained in Part I.A, *Bancec* firmly upheld the general rule that government instrumentalities are to be treated as independent from their governments, at the same time recognizing a narrow exception "to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." 462 U.S. at 633-634. Nothing in *Bancec* suggests that a court may extend that exception to impose on a government, as an equitable remedy for a perceived injustice, an arbitration agreement executed solely between the government's duly created instrumentality and a foreign party. And never before has a U.S. court required a nonsignatory government to arbitrate and thereby waive its procedural rights absent its consent.

Indeed, courts consistently reject attempts to bind any nonsignatory to arbitrate based on the alter ego doctrine. *E.g.*, *Kaplan* v. *First Options of Chicago, Inc.*, 19 F.3d 1503, 1523 (3d Cir. 1994) (nonsignatory sole shareholder not bound to arbitrate as alter ego of his signatory corporation, notwithstanding withdrawals of corporate funds for his personal use), aff'd, 514 U.S. 938 (1995); *InterGen N.V.* v. *Grina*, 344 F.3d 134, 149 (1st Cir. 2003) (refusing to pierce

corporate veil to compel nonsignatory to arbitrate in international dispute); *Gould, Inc.*, 969 F.2d at 769-770 (same); *Thomson-CSF, S.A.* v. *American Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995) (nonsignatory not bound to arbitrate as alter ego of its signatory subsidiary where subsidiary "continued to function as a distinct entity closely incorporated into the existing corporate structure of its parent company"). These decisions reflect the principle that arbitration is a consensual means of resolving "those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. A party that does not agree to arbitrate "will normally have a right to a court's decision," whereas a party agreeing to arbitrate

> relinquishe[s] much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

Id. at 942. The alter ego doctrine does not justify retroactively imposing an agreement to arbitrate on the Government, which never agreed to arbitrate and thereby surrender "the procedures and opportunity for review of the courtroom." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

To be sure, some cases recognize the *possibility* of applying the alter ego doctrine to require a nonsignatory to arbitrate, in particular where its relationship with an affiliated signatory demonstrates an "objective" intent to arbitrate on the part of the nonsignatory. See *Sarhank Group* v. *Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) (refusing to require a nonsignatory to arbitrate under a "veil piercing/alter ego" theory without proof of "an objective intention to agree to arbitrate"). That standard compels reversal here because it is undisputed that the Government never intended—subjectively or objectively—to arbitrate disputes with Bridas. The

Government (and Bridas) insisted from the very beginning that the Government not be a party to the JVA or its arbitration provision. See *supra* p. 2. The transaction with Bridas was carefully structured so that only Bridas and Turkmenneft would be obliged to arbitrate disputes. At Bridas' request, the Government executed an independent guaranty not subject to arbitration. *Bridas I*, 345 F.3d at 357-358. And when Bridas filed its arbitration claim, the Government objected immediately that it had never agreed to arbitrate, a position it has consistently maintained to this day.

The Fifth Circuit did not suggest otherwise, instead relying entirely on changes to the Turkmenian Party years after the agreements were in place and the joint venture was launched. It would be inconsistent with the consensual basis of arbitration to impose an agreement to arbitrate based on events occurring years after Turkmenneft and Bridas had mutually agreed (with the Government's consent) to exclude the Government from their arbitration agreement.

Furthermore, there is no need to resort to the *Bancec* injustice exception to determine whether a nonsignatory government is bound by the arbitration agreement of its instrumentality. The Court in *Bancec* set forth two additional exceptions to its general presumption that state-owned enterprises are independent. Those exceptions sufficiently and more appropriately protect contracting parties from any manipulation of an instrumentality's form by a foreign government.

The first of those exceptions is where there is "a relationship of principal and agent" between the government and instrumentality. *Bancec*, 462 U.S. at 629. Thus, if the Turkmenian Party had executed the JVA as the Government's agent, the Government might well be bound by the arbitration clause in the JVA as the real party in interest. But in *Bridas I*, 345 F.3d at 357-358, the Fifth Circuit expressly rejected applicability of the agency exception, concluding after an

extensive analysis that the Turkmenian Party did not execute the JVA as the Government's agent.

The other exception, for "fraud," also might bind a nonsignatory government to arbitrate where it fraudulently induced a party to agree to arbitrate with a sham state enterprise. That exception, too, has no role to play in this case. The Fifth Circuit found no fraud in the execution of the JVA or its arbitration provision, and Bridas cannot have been defrauded into agreeing to arbitrate only with the Turkmenian Party. After extensive negotiations and due diligence, Bridas knew full well that the Turkmenian Party was created and closely supervised by the Government but remained legally independent. Indeed, the JVA expressly stated that the Turkmenian Party was "a legal entity within the meaning of the laws of Turkmenistan" (R.9880), and the laws of Turkmenistan made clear that the Government "shall not bear responsibility for obligations of the State enterprise." R.9462 art. 3.3; R.9516. Thus, far from being defrauded in any sense, Bridas entered the transaction with its eyes wide open and knowingly chose to exclude the Government from any obligation to arbitrate.

The agency and fraud exceptions to the presumptive independence of state enterprises properly focus on factors relating to the question of consent to arbitrate. In contrast, authorizing use of the vague "injustice" exception in this context would permit courts to jettison affirmative contractual choices based on subsequent events having nothing to do with the choice of dispute resolution forum. That is precisely what the Fifth Circuit did in this case.

Even if the Government had abused the corporate form of the Turkmenian Party in the 1996 reorganization, as the Fifth Circuit stated, that would not authorize a court to overturn the parties' carefully negotiated forum allocation structure by imposing on the Government an arbitration provision to which it never consented. Nor was it necessary or equitable in

this case. Bridas' allegations against the Government amounted to a claim that the Government breached its guaranty of the joint venture's operational rights. R.7430. Bridas chose not to bring an action for breach of that guaranty in a proper forum. Having made that choice, Bridas should not be permitted to obtain a judicial re-write of the terms of the transaction and thereby impose arbitration absent the Government's consent.

B. The Fifth Circuit's Ruling Should Be Reversed To Prevent U.S. Courts From Undermining Global Economic Development.

The Fifth Circuit's improper invocation of the *Bancec* injustice exception raises an important issue of federal law with respect to the treatment of both state-owned enterprises and nonsignatories to arbitration agreements. Although the Fifth Circuit questioned whether "any uniform rule of federal law is or should be involved here" (App., *infra*, 5a n.5), this Court recognized in *Bancec*, 462 U.S. at 623, that "the principles governing this case are common to both international law and federal common law." The adverse consequences of the Fifth Circuit's ruling demonstrate the importance of this case and the compelling need for the Court's review to ensure that federal law does not undermine global economic development by allowing the alter ego doctrine to impose arbitration agreements on nonconsenting governments.

Forcing governments to arbitrate based on agreements executed by independent state enterprises would undermine the framework of global development in which "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Bancec*, 462 U.S. at 626. Companies are generally loath to enter into joint venture or other contracting arrangements. directly with a foreign government because they fear the government will raise a sovereign immunity defense in the event of a dispute. In

addition, providing for arbitration of disputes permits companies to avoid the risk of litigation in the foreign country's home courts. By the same token, foreign governments are generally loath to waive their sovereign immunity and put their public funds at risk by entering into arbitration agreements with foreign companies. See 28 U.S.C. § 1605(a)(6) (a foreign state waives sovereign immunity by agreeing to arbitrate). Independent state enterprises, with the legal capacity to execute contracts and arbitration agreements with private parties, enable these obstacles to be overcome. See *Bancec*, 462 U.S. at 625-626.

Allowing U.S. courts to wield a vague "injustice" standard to retroactively overturn forum allocation arrangements would deprive foreign states of notice as to what conduct might subject them to the arbitration agreements of state enterprises. Foreign governments would have little incentive to foster development through independent instrumentalities if, years later, they could suddenly be deprived of their sovereign immunity and all the protections of a judicial proceeding based on a U.S. court's view of "injustice." See *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 516 (1974) (a "parochial refusal" by U.S. courts to enforce agreements "specifying in advance the forum in which disputes shall be litigated" would undermine the "orderliness and predictability essential to any international business transaction").

This case provides a vivid illustration of the consequences of failing to respect such consensual forum allocations. In 1993, the Government, the Turkmenian Party, and Bridas carefully crafted their transaction so that only Bridas and the Turkmenian Party would be subject to arbitration. Three years later, in 1996, the Government appointed a replacement Turkmenian Party (as the JVA contemplated, see *supra* p. 2). In 2006, the Fifth Circuit decided that the 1996 appointment justified binding the Government to the 1993 arbitration agreement. As a result, the Government has been deemed

liable for $445 million and, because that amount was awarded in arbitration, deprived of a substantive appeal that would allow it to demonstrate that the award was inflated by some $200 million through use of an objectively erroneous discount rate. Governments (especially in small countries like Turkmenistan) cannot tolerate such unpredictable liabilities. Unlike the equitable setoff in *Bancec*, which was limited by the size of the foreign state's own affirmative claim, forcing unconsenting foreign states to arbitrate based on post-hoc "injustice" exposes them to virtually unlimited demands on the public fisc.

Moreover, foreign tribunals are likely to retaliate by refusing to recognize the independence not only of U.S. government instrumentalities (such as the TVA and Conrail) but, of more widespread concern, of the subsidiaries of private U.S. companies. See *Bancec*, 462 U.S. at 628 ("If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary").

In sum, this Court should grant review to prevent U.S. courts from undermining the use of independent state enterprises to attract capital and promote economic development. An "injustice" alleged years after a transaction was structured should not void forum allocation terms essential to such transactions. Just as the Court's grant of certiorari in *Bancec* recognized the importance of settling the issues raised in that case, the related issues presented here urgently require the Court's resolution.

III. IN CONFLICT WITH THIS COURT'S PRECEDENTS, THE FIFTH CIRCUIT MADE A CRITICAL FACTUAL FINDING ON AN ISSUE NOT ADDRESSED BY THE DISTRICT COURT.

According to the Fifth Circuit, the Government's 1996 appointment of Turkmenneft prevented Bridas from enforcing its $445 million arbitral award because Turkmenneft was financially incapable of meeting its obligations under the joint venture agreement. App., *infra*, 8a. That finding was critical to the court of appeals' decision because it provided the sole basis for the court's ruling that the Government committed an "injustice" binding it to the JVA's arbitration provision and the ensuing award. *Ibid.*

In the district court, Turkmenneft's ability to satisfy its contractual obligations was a disputed issue. Bridas argued that Turkmenneft was undercapitalized, contending that its initial capital was only $17,000 and that its operational revenues had to be deposited into a government fund that was immune from seizure. Appellant Opening Br. 18-19, 33, 37, 41, 51-53. The Government disagreed, noting that Turkmenneft had substantial assets beyond its stated capital, including valuable rights to commercially exploit oil and gas deposits, that it contributed substantial assets to the joint venture with Bridas, and that it continues to contribute assets to other joint ventures with foreign companies. Appellee Br. 6, 23, 33, 42, 45, 60. There was no evidence that Bridas had failed to collect due to Turkmenneft's inability to pay.

The district court did not resolve that debate, never addressing whether Turkmenneft had the assets to satisfy its contractual obligations, including payment of the arbitration award. See App., *infra*, 39a (finding only that Turkmenneft and the Government were not financially *separate* but not commenting on Turkmenneft's solvency). Nevertheless, the Fifth Circuit proceeded to make its finding on that issue. In

doing so, the Fifth Circuit overstepped its role as a reviewing court under Rule 52 of the Federal Rules of Civil Procedure.

An appellate court may reject a district court's factual finding if it is clearly erroneous. But an appellate court may not engage in *de novo* factfinding of its own:

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Anderson v. *City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). The Fifth Circuit's factfinding on an issue critical to its decision conflicts with *Anderson* and *Zenith Radio*. The Fifth Circuit's decision also conflicts with decisions of other courts of appeals. See, *e.g.*, *United States* v. *Dennison*, 410 F.3d 1203, 1210 (10th Cir. 2005) ("Because the district court declined to resolve this issue, and we cannot find facts, we therefore cannot validate the search of the truck under this rationale"); *Transmatic, Inc.* v. *Gulton Indus.*, 53 F.3d 1270, 1275-1276 (Fed. Cir. 1995) ("The requirement that the district court make factual findings permits meaningful review on appeal because this court may not engage in fact-finding on its own"); *United States ex rel. Honeywell* v. *A & L Mechanical Contractors*, 677 F.2d 383, 386 (4th Cir. 1982) ("The district court had not addressed that question, and we cannot find the facts").

Although ordinarily a federal court's failure to follow a settled rule of appellate procedure might not warrant this Court's supervisory review, this is not an ordinary case. As explained above, it is the first case in which a federal court has retroactively bound a government to an arbitration provision to which it never consented, thereby subjecting the

government to substantial damages. And the factual finding at issue provided the sole rationale for the Fifth Circuit's decision which, as demonstrated in Part II, *supra*, has serious implications for federal law and global economic development.

Furthermore, not only did the Fifth Circuit exceed its appellate authority, but the record offers no support for the Fifth Circuit's factual finding. Citing only Turkmenneft's stated capital, the court of appeals completely disregarded the unrebutted evidence of Turkmenneft's substantial assets. More fundamentally, it cited no evidence that Bridas ever tried and failed to collect due to the inability of Turkmenneft to pay the award. Thus, at a minimum, a factual finding that the reorganization deprived Bridas of its ability to enforce its award against Turkmenneft was premature. See *Schattner* v. *Girard, Inc.*, 668 F.2d 1366, 1369 (D.C. Cir. 1981) ("it was only when it became clear that Girard could not make good on the arbitration award that the issue of veil-piercing became ripe for consideration").

The Court should grant review on this question to ensure that the courts of appeals do not engage in impermissible factfinding.

IV. THE FIFTH CIRCUIT'S REFUSAL TO VACATE THE DAMAGES AWARD REFLECTS A DEEP CONFLICT OVER THE MEANING OF THE MANIFEST DISREGARD OF THE LAW STANDARD AND SHOULD BE REVERSED.

In the event the Court does not vacate the ruling below upholding arbitral jurisdiction over the Government, the Government requests that the Court grant certiorari and order vacatur of the arbitral damages award for manifest disregard of the law. In support of that request, the Government hereby incorporates the facts and argument set forth in the petition for certiorari filed by Turkmenneft after *Bridas I*, in which Turkmenneft sought interlocutory review on the question

whether the arbitral award should be vacated for manifest disregard of the law. See No. 03-1018 (cert. denied Mar. 22, 2004). Now that the judgment below is final, the Government requests that the Court again consider whether that question warrants its review.

In brief, Turkmenneft showed that the arbitrators' use of an interest rate, which the parties agreed would apply only to short-term loans, to discount a 25-year stream of uncertain profits *a fortiori* failed to account fully for inherent risk, improperly inflating the award by some $200 million and manifestly disregarding the governing law limiting recovery to actual damages. Turkmenneft further explained that the federal courts are deeply divided over the proper application of the manifest disregard standard. That division has only deepened since, as reflected in a petition for certiorari now before the Court. See *Signator Ins. Agency, Inc.* v. *Patten*, No. 06-49 (pet. filed July 10, 2006). Therefore, the Government requests that the Court review the Fifth Circuit's manifest disregard ruling in this case or, alternatively, hold Question 3 of this petition pending resolution of the *Signator* petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIDAS S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil and Gas Ventures, Ltd., and Bridas Corp., Plaintiffs-Appellants,

v.

GOVERNMENT OF TURKMENISTAN, Concern Balkannebitgazsenagat and State Concern Turkmenneft, Defendants-Appellees.

No. 04-20842.

April 21, 2006.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and DeMOSS and OWEN, Circuit Judges.

EDITH H. JONES, Chief Judge:

Bridas S.A.P.I.C. ("Bridas") appeals the district court's vacatur of an arbitration award against the Government of Turkmenistan ("Government"), a nonsignatory to an arbitration agreement between Bridas and a government-owned oil

and gas company. Because the totality of the record demonstrates that the Government should be bound as an alter ego of State Concern Turkmenneft ("Turkmenneft"), we REVERSE and RENDER for enforcement of the award.

This dispute has been in litigation longer than the agreement that spawned it. Bridas has pursued recovery against the Government for an oil and gas development deal gone awry. The catch has been that the Government was never a signatory to the relevant contractual documents. Bridas has borne the burden, before an arbitration panel and in federal court, of holding the Government liable. This appeal, after remand to the district court, represents the final refinement of numerous theories Bridas advanced against the Government. We review the district court's conclusion on remand that the Government was not an alter ego of Turkmenneft.

I. Background

In February 1993, Bridas, an Argentine corporation, entered into a joint venture agreement ("JVA") to exploit oil and gas resources with an entity designated by the Government of Turkmenistan, then recently liberated from the Soviet Union. Turkmenistan was rich in resources, but poor in technical expertise. Bridas was designated as the "foreign party" in the Joint Venture Keimir (named for the region in which exploration would be conducted). The "Turkmenian Party" to the agreement has been an entity wholly owned by the Government, whose identity was designated and redesignated at will by the President of Turkmenistan and has changed a number of times during the life of the joint venture.[1] Turkmenneft is the last entity to step into the role of

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[1] The original "Turkmenian Party" in the JVA was PA Turkmenneft. The Government claims that PA Turkmenneft and its successors can trace their roots back to 1922, and the founding of the Turkmen Oil Department by the All-Russian Soviet on National Energy, and that the legal status and core functions of the "Turk-

"Turkmenian Party." Under the JVA, the Turkmenian Party was entitled to receive hydrocarbon production up to the November 1992 levels, while the parties would split any subsequent increase in production. The JVA secured an unlimited export license for hydrocarbons.[2]

Notwithstanding that the JVA was intended to last twenty-five years, the relationship among Bridas, the Turkmenian Party, and the Government soured quickly. The Government insisted, among other things, on raising its share of future proceeds. To force Bridas's submission, the Government ordered Bridas in November 1995 to halt operations in Keimir and cease making imports into and exports from Turkmenistan.

Six months later, Bridas commenced an arbitration proceeding, as provided in the JVA, against the Government and Turkmenneft under the auspices of the International Chamber of Commerce. After Bridas filed its arbitration complaint, the Government dissolved the "Turkmenian Party" in the JVA, replacing it with Turkmenneft. The Government further abolished its Ministry of Oil and Gas. More importantly, the Government decreed that all proceeds from oil and gas exports in the country were to be directed to a special State Oil

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menian Parties" remained essentially unchanged during the life of the JVA. Even assuming that the assorted "Turkmenian Parties" assumed the responsibilities and performed the functions of their predecessors, the constant restructuring of Turkmenian oil concerns belies the Government's contention that the "Turkmenian Parties" were somehow identical.

[2] Curiously, Bridas has successfully maintained another joint venture arrangement in Turkmenistan concerning the hydrocarbon resources in a different province.

and Gas Development Fund; the fund's assets were declared immune from seizure.[3]

The arbitration was held by agreement in Houston, Texas, and covered nineteen days of trial proceedings plus the introduction of voluminous documentary evidence. A series of arbitration decisions was issued during the next several years by a two-to-one panel majority. Pertinent here, the panel held that the Government was a proper party to the arbitration and that the tribunal had the authority to adjudicate Bridas's dispute with the Government. The tribunal held both Turkmenneft and the Government liable for repudiating the JVA. In early 2001, the tribunal issued its final award of $495 million in damages to Bridas.

The dispute then moved to federal court in Houston as the parties filed cross motions to confirm, modify, or reject the arbitration award. The district court initially upheld the award, concluding that the Government was bound by the JVA under principles of agency and estoppel. This court, in *Bridas S.A.P.I.C.* v. *Government of Turkmenistan* ("*Bridas I*"), 345 F.3d 347 (5th Cir. 2003), considered several theories that could bind a non-signatory to an arbitration agreement: agency, alter ego, estoppel, and third-party beneficiary.[4] Rejecting all but one of those theories, *Bridas I* remanded for further consideration of the alter ego doctrine, as it found the district court's analysis of this "highly fact-based" issue incomplete and insufficient. The district court was instructed to "take into account all of the aspects of the relationship between the Government and Turkmenneft." *Id.* at 359-60. Be-

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[3] Six months earlier, the Government had already begun attempting to limit its exposure to liability when it passed a law expressly defining itself as only the Council of Ministers.

[4] The panel did not consider two other theories, incorporation by reference and assumption, which Bridas had waived on appeal. *Bridas I*, 345 F.3d at 356.

cause this court resolved other issues concerning the award in Bridas's favor, the sole issue on remand was reconsideration of the alter ego theory.

The district court on remand reviewed many of the factors identified by this court as pertinent and held that there was "an insufficient showing of complete domination or extensive control so as to warrant a finding that Turkmenneft was the alter ego of the Government of Turkmenistan." Bridas has appealed from the district court's resulting decision to vacate the award against the Government.

II. Discussion

As was noted in *Bridas I*, federal courts are not bound by the arbitration panel's findings holding the Government liable to Bridas.[5] *Bridas I*, 345 F.3d at 355-56. We review the district court's alter ego determination only for clear error. *Zahra Spiritual Trust* v. *United States*, 910 F.2d 240, 242 (5th Cir. 1990). Any errors of law are not entitled to such deference and are reviewed de novo. *W.H. Scott Construction*

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[5] There is an air of unreality to the analysis in this opinion, first because the JVA specified both that English law would govern the parties' relationship, and the arbitral tribunal was to convene in Stockholm, Sweden. The parties, however, agreed to arbitrate in Houston, Texas, and both parties have relied exclusively on U.S. law. As these agreements do not have jurisdictional consequences, this court is bound to decide a wholly foreign dispute that has been fortuitously arbitrated in this country.

Second, while *Bridas I* noted the parties' agreement that "federal common law" governs this case, and we are bound by the earlier panel's approach under law of the case doctrine, this agreement rested on a fundamental misunderstanding. It is highly unlikely that any uniform rule of federal law is or should be involved here. *See United States* v. *Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985).

Company v. *City of Jackson*, 199 F.3d 206, 219 (5th Cir. 1999).

A bedrock principle of corporate law is that "a parent corporation . . . is not liable" for actions taken by its subsidiaries. *United States* v. *Bestfoods*, 524 U.S. 51, 61, 118 S.Ct. 1876, 1884, 141 L.Ed.2d 43 (1998). The same concepts of corporate separateness have been applied to business entities owned by foreign governments. *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 623-27, 103 S.Ct. 2591, 2598-2600, 77 L.Ed.2d 46 (1983). However, courts will apply the alter ego doctrine and hold a parent liable for the actions of its instrumentality in the name of equity when the corporate form is used as a "sham to perpetrate a fraud." *Pan Eastern Exploration Co.* v. *Hufo Oils*, 855 F.2d 1106, 1132 (5th Cir. 1988). In making an alter ego determination, a court is "concerned with reality and not form, [and with] how the corporation operated." *United States* v. *Jon-T Chemicals, Inc.*, 768 F.2d 686, 693 (5th Cir. 1985). Unlike the theory of agency, which interprets a contractual relationship, *Bridas I*, 345 F.3d at 358, alter ego examines the actual conduct of the parent vis-á-vis its subsidiary.

The alter ego doctrine, like all variations of piercing the corporate veil doctrine, is reserved for exceptional cases. *In re Multiponics, Inc.*, 622 F.2d 709, 724-25 (5th Cir. 1980). The doctrine applies only if "(1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *Bridas I*, 345 F.3d at 359. Given the difficulty of analyzing the control factors in this case, we first address the "fraud or injustice" prong.

A. Fraud or Injustice

To prevail, Bridas had to demonstrate that the Government used its control over Turkmenneft to commit a "fraud or injustice" against Bridas. *See Banco*, 462 U.S. at 630, 103 S.Ct. at 2601; *Edwards Co.* v. *Monogram Indus., Inc.*, 730 F.2d 977, 984 (5th Cir. 1984). The Government asserts that only fraud—and no other type of injustice-satisfies this prong of the alter ego test. *Edwards* and other cases plainly envision a broader scope that includes the misuse of the corporate form to promote injustice. *See Edwards*, 730 F.2d at 981, 984. In both *Jon-T* and *Subway Equip. Leasing Corp.* v. *Sims* (*In re Sims*), 994 F.2d 210 (5th Cir. 1993), this court explained that "fraud" may be required to pierce the corporate veil in contract cases, because the party seeking to utilize the doctrine has had the opportunity, during negotiations with a subsidiary, to obtain assurances of payment from its parent. Even there, however, the decisions acknowledge that the test may be met through an "illegal act" or "[misuse of] the corporate form." *Sims*, 994 F.2d at 217-18. In this contract dispute, Bridas thus had to connect the Government misuse of its "subsidiary" Turkmenneft to the fraud or injustice against it.

In this case, the act of injustice on which the district court focused was the Government's 1995 export ban, which was accomplished through "the Government's exercise of sovereign control of Turkmenistan's borders, not through governmental control of Turkmenneft." The Government's exercise of its sovereign powers may have constituted a wrong to Bridas, but it was not a wrong based on misuse of the corporate organizational form. Contrary to the court's conclusion, the 1995 export ban is not a "fraud or injustice" for alter ego purposes.

This court may, however, affirm the district court's determination that the "fraud or injustice" prong was satisfied if there is other evidence on the record, and argued by Bridas

below, to support such a holding. *See Bickford* v. *Int'l Speedway Corp.*, 654 F.2d 1028, 1031 (5th Cir. 1981).

As it happens, there is ample evidence that after the 1995 export ban the Government misused Turkmenneft to harm Bridas by destroying the value of the JVA. In 1996, when the Government dissolved the Turkmenian Party and replaced it with Turkmenneft,[6] Turkmenneft was initially capitalized with the equivalent of only $17,000 U.S. and was funded by a State Oil and Gas Development Fund expressly rendered immune from seizure under newly enacted Turkmenian law. Yet Turkmenneft became the party bound to arbitrate under the JVA and liable for any adverse award. At the same time, the Government issued a number of decrees distancing itself from the joint venture and attempting to limit its potential exposure to liability. The Government's manipulation of Turkmenneft to prevent Bridas from recovering any substantial damage award satisfies the "fraud or injustice" prong. *See Patin* v. *Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 648-49 (5th Cir. 2002) (piercing the corporate veil where a company transferred its operations from one party to another to escape liability).

B. Control

The more difficult issue is whether the Government exercised such complete control over Turkmenneft as to be its alter ego. *Bridas I* held that the district court erred in failing to consider "the totality of the circumstances in which the

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[6] This should not imply that the act of changing parties was an indication of fraud or injustice per se, as such power was recognized in the Turkmenian President by the JVA, and was approved of by Bridas on other occasions. However, the Government's manipulation of the Turkmenian Party in this instance indicates that the Turkmenian Party was utilized to disadvantage Bridas in any contractual dispute.

[corporation] functions." *Bridas I*, 345 F.3d at 359. The panel remanded to the district court with a long though non-exclusive list of factors to consider in its application of the alter ego doctrine. *Id.* at 360, n. 11.

Bridas I first identified twelve "private law" factors commonly utilized by this circuit in making a corporate alter ego determination:

> (1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities.

Id. The court then referenced three more private law factors: "(1) whether the directors of the 'subsidiary' act in the primary and independent interest of the 'parent'; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arm's length." *Id.* Finally, the panel instructed the district court to take into account six "public law" factors held relevant in this court's cases, to determine whether a state agency shares the state's Eleventh Amendment sovereign immunity:

> (1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local

> autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Id. In all, the district court was given the task of evaluating how up to twenty-one factors bear on the facts of this case.[7]

The district court ultimately concluded that the Government did not "exercise complete domination or extensive control" over Turkmenneft. The district court conscientiously attempted to analyze the relationship between the Government and Turkmenneft according to our opinion in *Bridas I* and prior case law. We respectfully but firmly disagree with the district court's conclusion and find it clearly erroneous. The court's error lay in elevating the form over the substance of the relationship as it pertained to the transaction with Bridas. *Compare Jon-T*, 768 F.2d at 693 (stressing that in applying the alter ego doctrine, courts must be "concerned with reality and not form").

The court first examined the "formalities factors" in the Government-Turkmenneft relationship.[8] The court observed that the Government caused the incorporation of Turkmenneft and that there was some identity between high-ranking Government and Turkmenneft officials. Further, Government

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[7] We note that in *Jon-T*, 768 F.2d at 691-92, this court provided a "laundry list" of factors that may be relevant in a corporate veil-piercing case, but we commented that it may not be necessary to analyze each of them in every case.

[8] The district court included in this part of the discussion: whether the parent and subsidiary have common stock ownership; common directors or officers; common business departments; parent cause incorporation of the subsidiary; subsidiary's authority to sue and be sued in its own name; subsidiary's observance of corporate formalities; subsidiary's right to hold and use property.

officials attended the JVA's board meetings. More important to the court, however, were that Turkmenneft's "legal status was explicitly recognized on the face of the JVA"; that Turkmenneft is "solely responsible for its own obligations"; and Turkmenneft existed "as a juridical entity long before the events in question." The court also found that Turkmenneft and its predecessors had the right to and did actually hold and use property, and that Turkmenneft can sue and be sued in its own name.

The court did not consider "all of the formalities required by corporation law, including keeping separate books and records and holding regular meetings of shareholders and of the board of directors." *Jon-T*, 768 F.2d at 693. Nevertheless, based on the evidence that it considered, the court reached a plausible outcome that Turkmenneft exhibited certain "corporate formalities." Those aspects of the equitable calculation are, however, subordinate to ascertaining the reality of the corporate relationship. *Jon-T*, 768 F.2d at 693.

The court found, with regard to the "operations" factors, that Turkmenneft was "operationally separate from the Government."[9] The court relied heavily on the assertions that Turkmenneft could trace its origins back many decades within the structure of the then-Soviet Union, *but see* note 1, *supra*, and that it had engaged in joint ventures with other foreign concerns. The court recited the arbitrator's conclu-

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[9] The "operations" factors include whether: parent and subsidiary have common business departments; subsidiary receives no business except that given by the parent; parent uses the subsidiary's property as its own; separateness of the two corporations' daily operations; whether directors of the "subsidiary" act independent and primary interest of the "parent;" whether the parent deals with the subsidiary "at arm's length;" impact of statutes on whether the entity is an arm of the state; entity's degree of local autonomy; and the entity's concern primarily with local, as opposed to statewide, problems.

sion that under the JVA, "[Bridas] tended to run the project as their own fiefdom, which to some extent by the terms of the JV Agreement, it was." Further, in two instances, Turkmenneft officials had sided with Bridas against the Government. On these grounds, the court found Turkmenneft was operationally separate from the Government.

Immediately preceding that conclusion, however, and contradicting it, the court described Turkmenneft as a "closely held subsidiary, demonstrated by how the Government is continuously changing the name of the organization," and by how the Government used its sovereign powers to force Bridas to give Turkmenneft a financial advantage which would ultimately benefit the Government. The court also found that the Government "did not really deal with Turkmenneft at arm's length."

Although the balance of "formalities factors" and some of the "operational factors" may be consistent with Turkmenneft's existence as an independent and self-supporting entity, the court's skepticism about Turkmenneft's arm's-length status is critical. The Government manipulated Turkmenneft legally and economically to repudiate the contract with Bridas and then render it impossible for Bridas to collect damages. This conclusion is reinforced by the court's brief but revealing review of the "finances" factors.[10] As the court noted, not only was the Turkmenian Party financed by the Government, but when the Government created Turkmenneft as the Turkmenian Party's successor, Turkmenneft was grossly undercapitalized with the equivalent of $17,000 U.S., a paltry sum to finance oil and gas exploration and produc-

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[10] The "finances" factors include whether: the parent and subsidiary file consolidated financial statements; the parent finances the subsidiary; the subsidiary operated with grossly inadequate capital; the parent pays salaries and other expenses of the subsidiary; others pay or guarantee debts of the dominated corporation; and the source of the entity's funding.

tion. The court noted the absence of any financial statement or balance sheet for Turkmenneft, whether under U.S. or local law. Turkmenneft's revenues were diverted to a State Oil and Gas Fund that also collected revenues from other state-owned entities. Although the Government contends that the joint venture, not the Government, paid the joint venture's salaries and expenses, Turkmenneft's costs of arbitration have been paid entirely from the State Fund. The court accordingly found that Turkmenneft was not financially independent from the Government and that the Government used the lack of financial separateness "to commit a fraud or another wrong on plaintiffs."

With this conclusion, we concur. Undercapitalization is often critical in alter ego analysis. *Gardemal* v. *Westin Hotel Co.*, 186 F.3d 588, 594 (5th Cir. 1999); *see also, Trustees of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds* v. *Lutyk*, 332 F.3d 188, 198 (3d Cir. 2003). The fact that Turkmenneft owned producing rights and equipment that it contributed to the joint venture does not in this case support a claim of financial separateness, because such resources could only carry value if the venture were allowed to keep its own revenues, which it was not. Further, the Government changed the law to prevent Turkmenneft's assets from being seized by a creditor such as Bridas, after the initiation of arbitration proceedings. The fact that a subsidiary maintains what amounts to a "zero balance," and relies exclusively upon another entity to service its debts, is strong evidence that the subsidiary lacks an independent identity. *Hystro Prods., Inc.* v. *MNP Corp.*, 18 F.3d 1384, 1389 (7th Cir. 1994); *see also Nat'l Elevator Indus.*, 332 F.3d at 198 (noting that an "element of injustice or fundamental unfairness" is present where incoming revenues are directed away from an undercapitalized corporation and into the hands of the controlling party).

Despite some indicia of separateness, the reality was that when the Government's export ban forced Bridas out of the joint venture, the Government then exercised its power as a

parent entity to deprive Bridas of a contractual remedy. Intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil. It is true that the standard for this equitable remedy should be more stringent in breach of contract cases, because the creditor has willingly transacted business with a subsidiary and, as here, forewent the opportunity to obtain a guarantee of Turkmenneft's debts by the Government. The standard is met in this case, however, because Turkmenneft assumed full responsibility for its obligations under the joint venture. The Government, as Turkmenneft's owner, made it impossible for the objectives of the joint venture to be carried out.

In this rare case, we are compelled to reverse the district court's finding and conclude that the Government acted as the alter ego of Turkmenneft in regard to this Joint Venture Agreement with Bridas.

Accordingly, the judgment of the district court is REVERSED, and JUDGMENT RENDERED for Bridas authorizing enforcement of the arbitration award.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

BRIDAS S.A.P.I.C., ET AL.

v.

GOVERNMENT OF TURKMENISTAN, ET AL.

Docket No. Civ. H. 99-2171

September 10, 2004

ORDER

On remand from the United States Court of Appeals for the Fifth Circuit and pending before this Court is the jurisdiction and arbitration award matter between Bridas parties and the Government of Turkmenistan. Having assessed the parties' detailed submissions and the applicable law, the Court finds that the State Concern Turkmenneft is not the alter ego of the Government of Turkmenistan, therefore a finding of piercing the corporate veil is not warranted. Therefore the Court GRANTS the Renewed Motion of Government of Turkmenistan to Vacate the Arbitration Awards (Instrument No. 119).

I.

Plaintiffs Bridas S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures, Ltd., and Bridas Corporation (collectively, "Bridas") originally brought this action to confirm an international arbitration award rendered in Bridas' favor against Defendants Government of Turkmenistan, ("the Government" or "Government of Turkmenistan"); Concern Balkannebitgazsenagat; and State Concern Turkmenneft ("Turkmenneft" or the "Turkmenian Party"). (Instrument No. 111, at 1-2).

On February 10, 1993, Bridas, an Argentinian corporation, entered into a joint venture agreement ("JVA" or the "Agreement"), with Turkmenneft, which was known as the Turkmenian Party[1] at the time of the Agreement, a Turkmenian production association. The Turkmenian Party was created by the Government of Turkmenistan as an independent legal entity within the meaning of the laws of Turkmenistan which is responsible for the production of oil in Turkmenistan. The parties to the JVA, Bridas and Turkmenneft, were to conduct hydrocarbon operations in an area in southwestern Turkmenistan known as Keimir. *Id.*, at 2. The Government itself was not a signatory to the Agreement. This joint venture entity was called Joint Venture Keimir ("JVK"). *Id.* In agreements drafted by the parties, it was stipulated that all disputes, controversies, or claims arising out of this venture would be settled by arbitration. *Id.*

In November 1995, Bridas claims that the Government ordered Bridas to suspend operations in Keimir and prohibited Bridas from making imports and exports in or from Turkmenistan. *Id.* On April 15, 1996, Bridas initiated an arbitration proceeding with the International Chamber of Com-

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[1] Over time, the Government substituted various other entities to serve as the Turkmenian Party, ultimately resting with State Concern Turkmenneft.

merce ("ICC") against the Government and Turkmenneft. *Id.*, at 3.

On June 21, 1996, Government of Turkmenistan argued to the ICC Court of Arbitration that it was not a proper party to the arbitration. *Id.* Government of Turkmenistan asserted that it did not sign the JVA and thus, was not a party to the agreement's arbitration clause. *Id.* The arbitrators decided that they would resolve this jurisdictional dispute and referred it to a three-person tribunal. *Id.* Proceedings before the tribunal began in January 1997 and involved nineteen days of hearings, expert reports, testimony on damages, and legal briefing. *Id.* On June 25, 1999, a two-person majority issued its First Partial Award ("FPA") which held that the arbitrators had the ability to determine whether they had jurisdiction over the Government, found that the Government was a proper party to the arbitration and that the JVA bound the Government to arbitrate. (*Id.*, at 4; Instrument No. 119, at 2). The tribunal further ruled that Turkmenneft had repudiated the JVA and that all Defendants, including the Government of Turkmenistan were liable for the repudiation of the JVA. On July 5, 1999, Bridas formally accepted the Defendant's repudiation of the JVA as determined by the tribunal's findings. *Id.*, at 4.

The tribunal issued its Second Partial Award ("SPA") on October 21, 1999. *Id.* The same two-person majority held that the Tribunal had the jurisdiction to consider and calculate an award amount concerning Bridas' damages from the breach of the JVA. *Id.* Arbitrators rendered the Third Partial Award ("TPA") on September 2, 2000, clarifying their previous rulings by setting a discount rate and making necessary calculations for awarding damages. *Id.* On January 26, 2001, the Tribunal majority awarded approximately $495,000,000 in damages to Bridas, of which $133 million was against Turkmenneft alone. (*Id.*, at 5; Instrument No. 119, at 2).

Bridas filed suit on July 7, 1999 in this Court, to confirm the FPA. *Id.* In response, the Government and Turkmenneft filed a motion to dismiss the application for confirmation and a motion to vacate and refuse confirmation of the FPA. (Instrument No. 111, at 4). Due to the arbitration panel's rulings in their favor, Bridas withdrew its motion to confirm the FPA in February 2000, leaving Defendants' motions to dismiss confirmation as moot. *Id.* The motions that remained before this Court were Defendants, the Government and Turkmenneft's motions to vacate or modify the FPA, TPA, and Final Award. *Id.* On December 22, 2000, the Government conditionally joined Turkmenneft to move to vacate or modify the TPA and the Final Award. *Id.*

On September 30, 2001, this Court ruled on the motions, citing principles of agency and estoppel that bound the Government, a non-signatory party, to the JVA, as well as the established deference to an arbitration panel's decisions, this Court issued an order denying the Government and Turkmenneft's motions to vacate or modify the FPA, TPA, and the Final Award. *Id.*, at 5. This Court upheld all of the arbitration panel's decisions. *Id.*

Defendants, Turkmenneft and the Government, appealed this Court's judgment to the United States Court of Appeals for the Fifth Circuit, petitioning the Court of Appeals to resolve several issues. *Id.* The first issue was whether the Tribunal had jurisdiction over the Government. *Id.* The second issue involved the question as to whether the Tribunal majority's rulings on the merits were in "manifest disregard of the law." *Id.*, at 6. Lastly, Turkmenneft and the Government asked whether the Tribunal majority exceeded its authority in calculating the damage award. *Id.*

On September 9, 2003, the Court of Appeals vacated and remanded, in part, this Court's decision refusing to vacate the FPA, TPA, and Final Award, declaring that this Court did not conclusively address the jurisdictional issue. Where a party is

a non-signatory to an agreement, as the Government is in this case, there are six theories that have been recognized to determine if such a party should be bound to an arbitration agreement. *Id.*, at 12. These include the theories of incorporation by reference, assumption, agency, veil-piercing/alter ego, estoppel and third-party beneficiary. *Id.* Since the Fifth Circuit found that Bridas waived arguments premised upon the theories of incorporation by reference and assumption, in their appeal, the Court of Appeals assessed the other four factors. *Id.*

First, with respect to the issue of agency, the Court of Appeals states in their September 29, 2003 Order that agency is the "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.*, at 14. This Court previously held in its October 1, 2001 Order, that the Government was bound to arbitration with Bridas because Turkmenneft was an agent of the Government, basing its analysis on three pieces of evidence; a letter, a provision found in the JVA, and statements made in another letter regarding the status of a government entity in JVK and in another JVA. *Id.*, at 13-15. The Court of Appeals found that these evidentiary findings were insufficient to support an agency determination, holding that a guarantor cannot be compelled to arbitrate by an arbitration clause when it is not a party to the agreement in which the clause is found in. *Id.*, at 16. Also, the Court of Appeals concluded that a statement of representation, such as a single provision regarding oral modifications and the original agreement, was not remarkable for agency purposes. *Id.* Lastly, the Court reasoned that language found in a separate letter did not supercede the language found in the original JVA itself. *Id.* Consequently, the Fifth Circuit vacated this Court's decision regarding agency and held that the "district court's holding that Turkmenneft is an agent of the Government does not

withstand our review, regardless of the standard applied." (Instrument No. 111, at 14).

For the theory of alter ego to apply, a court must assess whether the corporation was bound by the agreement entered into by its subsidiary regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its law. *Id.*, at 19. There is usually some form of fraud committed for the alter ego theory to be applied, which "pierces the corporate veil." *Id.*, at 19-20. This Court found in its September 30, 2001 Order that the Government was not an alter ego of Turkmenneft because Bridas did not proffer evidence of the absence of corporate formalities and did not show any indication of the intermingling of corporate finances and directorship. *Id.* Because no single factor is determinative and alter ego determinations are highly fact-based, only taking into account corporate formalities, finances, and its directorship was insufficient. *Id.*, at 21. The Court of Appeals found that this Court "failed to take into account all of the aspects of the relationship between the Government and Turkmenneft, [therefore] it committed an error of law and must reconsider the issue on remand." *Id.* Alter ego is the only issue the Fifth Circuit remanded for this Court's reconsideration. *Id.*

This Court, in its October 1, 2001 Order, found that a nonsignatory may be equitably estopped from asserting that it is not bound by an arbitration agreement when the signatory raises allegations of substantially interdependent and concerted misconduct against both a nonsignatory and one or more of the signatories to the conduct. *Id.*, at 23. However, the Court of Appeals found that the intertwined claims theory of equitable estoppel was misapplied. *Id.*, at 23. Since the Government was not a party to the agreement and did not sign it, the difference in status allows for a distinction. *Id.* The Fifth Circuit concluded that Bridas' argument of direct benefits estoppel was unavailing because there was no showing of the Government suing Bridas under the agreement, thus the Government has not exploited Bridas through spe-

cific terms found in the agreement. *Id.*, at 27. Specifically, the Court of Appeals held, "[h]ere it is undisputed that the Government has not sued Bridas under the agreement. The Government has thus not 'exploited' the JVA to the degree that the cases that consider applying this version of estoppel require." *Id.*

The Fifth Circuit noted, that to bind a nonsignatory under the theory of third-party beneficiary, a court analyzes the intentions of the parties at the time of a contract's execution. *Id.* The Court of Appeals held that the theory of third-party beneficiary was insufficient to bind the Government merely because it benefitted from the existence of the JVA. *Id.* Even if a third party is directly affected by other parties' conduct and has a substantial interest in the contract's enforcement, The Fifth Circuit reasoned that these factors do not make it a third-party beneficiary. *Id.*, at 28. The Court of Appeals further reasoned that parties are presumed to contract only for themselves and this presumption is superceded only in situations where there is a clear intent to make someone a third-party beneficiary. *Id.* In the original JVA, the terms sufficiently define the parties as "Turkmenian" and "foreign" parties. *Id.* There is no mention of the Government as a party to the original agreement. *Id.* Lastly, the Court declined to bind, for the first time, a nonsignatory third-party beneficiary to arbitration disputes in which it is not a party and did not initiate the cause of action. *Id.*, at 29. Consequently, the Fifth Circuit vacated this Court's decision and held that the Government was not a third party beneficiary in this case. (Instrument No. 111 at, 28-29)

The Court of Appeals, however, affirmed the district court's refusal to vacate or modify the TPA or Final Award. *Id.*, at 31. Established precedent calls for vacating or modifying an arbitration award only when an arbitration panel acts with "manifest disregard for the law." *Id.*, at 30. The Court of Appeals deferred to the Tribunal's findings, reasoning that the panel responsibly utilized a variety of industry factors,

agreement evidence, and expert opinions to make its conclusions. *Id.*, at 33. The Fifth Circuit also noted that the formulation and calculation of a present-value analysis is not an exact science and all factors considered, the panel acted within its wide discretion. *Id.* The Court of Appeals pointed out that the Government and Turkmenneft did not assert any compelling English Law regarding discount rates to challenge the calculation of damages. *Id.*, at 34. Furthermore, the Court of Appeals declined to alter the panel's decision because the Government's appeal was merely for a "second guess." *Id.*, at 32-33. Since, the Fifth Circuit found that the arbitration panel did not act in "manifest disregard for the law" in setting the discount rate and that the damages awarded to Bridas were not punitive damages, the Court held that the "district court's refusal to vacate or modify the TPA or Final award is AFFIRMED." *Id.*, at 36. However, the Court of Appeals also held that "the district court's decision refusing [to] vacate the FPA because the Government was subject to the jurisdiction of the Tribunal is VACATED and REMANDED." *Id.*

On October 21, 2003, this case was reopened in the United States District Court for the Southern District of Texas, Houston Division. Extensive briefing on the remand issue began on January 1, 2004. Now, this Court must address the single remand issue of whether the corporate veil may be pierced, in this case, allowing the Government to be held liable as an alter ego of Turkmenneft.

II.

Under the alter ego doctrine, a corporation may be bound by an agreement entered into by its subsidiary regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its terms, "when their conduct demonstrates a virtual abandonment of separateness." *Bridas S.A.P.I.C.* v. *Govt. of Turkmenistan*, 345 F.3d 347, 359 (5th Cir. 2003)

(citing *Thomson-CSF, S.A.* v. *American Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995)). The doctrine has strong ties to equity for the third party. *See Harrell* v. *DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992).

However, the decision to apply the alter ego doctrine binding a parent to its subsidiary, thus "piercing the corporate veil," is rare. *See Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003). The doctrine focuses on the relationship between the corporation and its owners, not on the relationship between the corporation and the claimant who asks for the corporate veil to be pierced. *Pan Eastern Exploration Co.* v. *Hufo Oils*, 855 F.2d 1106, 1131-32 (5th Cir. 1988). Thus, fairness to the claimant is not the rationale behind the theory. *Id.* at 1132. In contrast, the "sham to perpetrate a fraud" theory is, "the focus is on some inequitable result for the claimant because of something about the corporate form." *Id.* at 1133. With this standard, the corporate veil may be pierced to hold an alter ego liable for the commitments of its subsidiary only if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit fraud or wrong that injured the party seeking to pierce the veil. *Bridas*, 345 F.3d at 359.

Alter ego determinations are highly fact-based and require consideration of the totality of the circumstances. *Estate of Lisle* v. *C.I.R.*, 341 F.3d 364, 375 (5th Cir. 2003). Because no single factor is conclusive, a court should consider the relationship between the entities to prove an alter ego determination:

> (1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the sub-

> sidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities.

See Estate of Lisle, 341 F.3d at 376 (citing *Oxford Capital Corp.* v. *U.S.*, 211 F.3d 280, 284 n.2 (5th Cir. 2000)). Additional factors include: (1) whether the directors of the "subsidiary" act in the primary and independent interest of the "parent,"; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arms length. *Markow* v. *Alcock*, 356 F.2d 194, 197-198 (5th Cir. 1966).

While the preceding considerations are also utilized in the context regarding a sovereign government and its instrumentality, the courts should also consider these additional factors when determining if a state agency is the "alter ego" of the state to address any 11th Amendment sovereign immunity concerns:

> (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

See *Bridas*, 345 F.3d at 360 n.21 (5th Cir. 2003).

III.

The Fifth Circuit vacated this Court's ruling with respect to the Government, ruling that neither agency nor estoppel theories bound the Government to arbitrate. (Instrument No. 111, at 17, 23). However, the Court of Appeals remanded for further findings on Bridas' alter ego theory, ruling that this Court had not examined "all of the aspects of the relationship between the Government and Turkmenneft." *Id.*, at 21.

Plaintiff argues that in order to determine the issue of piercing the corporate veil/alter ego, this Court should focus on the "fictitiousness of the ostensible corporate separateness of the two entities in question . . . and the equitable element [which] in alter ego cases is a finding that the controlling entity used its control to commit a fraud or wrong that injures the party invoking the alter ego principle." (Instrument No. 112, at 11). Although the Plaintiff does admit that an element of fraud is part of the analysis, they concentrate their argument on the factors that determine whether or not the corporate entities were separate. *Id.*, at 12. The cases that Plaintiffs cite are alter ego cases that involve tort claims. Specifically, Plaintiffs rely on *First Nat'l City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) ("*Bancec*") and *United States* v. *Jon-T Chemicals, Inc*, 768 F.2d 686 (5th Cir. 1985) ("*Jon T Chems*") to support their contention that "[g]iven the overwhelming evidence of Turkmenistan's control over the Turkmenian party, it is not necessary to reach the question of fraud or injustice. Bridas claims it can easily show that equity favors treating the Turkmenian party as Government of Turkmenistan's alter ego." (Instrument No. 129, at 13).

Defendant, the Government of Turkmenistan, focuses their analysis of the piercing the corporate veil/alter ego issue on whether the corporate form was used to perpetuate fraud or another wrong upon a third party. (Instrument No. 119, at 3). The Government argues that Bridas cannot show circum-

stances that warrant the extraordinary equitable relief of piercing the corporate veil. *Id.*, at 6. The Defendant also contends that the Government did not exercise complete control over Turkmenneft thus, the requisite degree of control is not present in this case. *Id.* Further, Defendant asserts that unless the parent has abused its control to commit fraud or other injustice that proximately caused the injury of which the other party complains, inquiry into the degree of control exercised by the parent corporation is not necessary.

In looking at the issue of piercing of the corporate veil/alter ego, the Fifth Circuit has held that "[o]nce it has been determined that the corporate form was used to effect fraud or another wrong upon a third-party, alter ego determinations revolve around issues of control and use." (Instrument No. 111, 21, at fn11). In addition, the Fifth Circuit held in *Sims*, that "[a]lthough a finding of fraud is not essential in tort cases, in contract cases, fraud is an essential element of an alter ego finding." *Subway Equip. Leasing Corp.* v. *Sims (In re Sims)*, 994 F.2d 210 (5th Cir. 1993). In contrast, the Fifth Circuit found in *Jon-T Chems* that where the plaintiff's claims sounded in tort rather than contract, and the plaintiff did not voluntarily enter into the relationship with the subsidiary, when the parent company completely dominated the subsidiary, the parent was jointly and severally liable for the judgment entered against the subsidiary, without a finding of fraud. 768 F.2d 686 (5th Cir. 1985).

Plaintiffs rely on *Bancec*, asserting that control is the pivotal issue in alter ego and piercing the corporate veil cases. However, *Bancec* is distinguishable on the facts. In that case, the Republic of Cuba established a state-owned bank subsidiary that sued in U.S. court to collect on a letter of credit issued by Citbank's predecessor. Citibank counterclaimed, asserting set-off for the value of its assets that had been nationalized by the Cuban government. Bancec claimed immunity from this counterclaim. After Bancec sued, but before Citibank answered, Bancec was dissolved and liqui-

dated. *Id.*, at 631. The Court refused to let the Cuban government assert a "sword and shield" position that allowed it to act as claimant through Bancec on the one hand, yet use Bancec's separate corporate status to hide from the counterclaim on the other. *Id.* at 629-33. The Court in *Bancec* relied on "'the consideration of fair dealing' [that] bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim." *Id.* at 630 (quoting *Nat'l City Bank* v. *Republic of China*, 348 U.S. 356, 65 (1955)). These are not the circumstances in this case. The Government has neither attempted to use the U.S. courts through its subsidiary nor has it asserted sovereign immunity to avoid any counterclaims.

Once this Court determines that the corporate form was used to effect fraud or another wrong upon a third-party, the Fifth Circuit instructs this Court to "explore the totality of the environment in which Turkmenneft operated, including those factors normally explored in the context of parent-subsidiary alter ego claims." (Instrument No. 111, at 22 fn. 11).

According to the Plaintiffs, the dispute in this case stems from the failed Joint Venture of Keimir ("JVK") which was based on the joint venture agreement ("JVA"), a contract. (Instrument not 112, at 5-6). Consequently, because this case is based on a contract, if there is no "fraud or another wrong" then the corporate veil may not be pierced, regardless of the degree of control the Government might have over Turkmenneft.

A.

The Government asserts that "Bridas never claimed and the arbitrators never found that it had been defrauded regarding Turkmenneft's financial condition." (Instrument No. 127, at 3). According to the Government, Bridas cannot show the kind of fraud with respect to subsidiary's financial condition that is essential to pierce the veil in a contract case. *Id.* The

Government also contends that Bridas cannot show any other wrong resulting from an abuse of Turkmenneft's corporate form. Government of Turkmenistan argues, that the "best that Bridas can offer is a claim of 'highly injurious breaches of contract.'" *Id.*, at 4. According to Defendants, Bridas claims it was harmed by the Government's exercise of its sovereign control over exports rather than through the abuse of Turkmenneft's corporate form. (Instrument No. 119, at 9).

The Government also asserts that Turkmenneft had a long history before its agreement with Bridas. What is now known as Turkmenneft began in 1925 when it operated as a separate legal entity under the direction of the Ministry of Oil and Gas of the new established USSR. (Instrument No., 119, at 15). That arrangement remained in place until Turkmenistan gained its independence in 1991. *Id.*, at 16. According to the Government, Turkmenneft was continuously responsible for the production of oil in Turkmenistan, both before and after independence. *Id.* The Government claims that well before Bridas negotiated the JVA and throughout the time of the Joint Venture, Turkmenneft had a number of oil and gas production companies as departments with hundreds of employees. *Id.*, at 16. In addition, the Government contends that before the joint venture with Bridas, Turkemenenft had produced hundreds of millions of barrels of oil. *Id.* The Keimir field was discovered in 1978, a second field was discovered in 1983 and the associated exploration area was discovered in 1986. By the time the JVA was signed, the Government argues that the Keimir and other fields were substantially developed and producing. *Id.* All of these fields were on Turkmenneft's balance sheet. *Id.*

Plaintiffs rely heavily on the factors that establish the Government's control over Turkmenneft to support a finding of "fraud or other wrong." In this case Plaintiffs claim that the "clearest evidence of Turkmenistan's wrongful purpose to escape the liability that properly belongs to it can be seen in the actions that it took just as soon as the arbitration had

begun. In July 1996, the President of Turkmenistan abolished the Ministry of Oil and Gas approximately two months after being served with arbitration papers (Instrument No. 129, at 13-14; Instrument No. 115, at 6412-6409). Plaintiffs allege that all the Turkmenian Party's Revenues were diverted to a fund controlled by the President. Plaintiffs contend that the President "simultaneously passed a decree insulating Turkmenistan from paying for any liability owed by the Turkmenian Party under the JVA. According to Plaintiffs, "[t]his injustice fully supports application of the alter ego doctrine in this case." (Instrument No. 129, at 13-14).

Bridas also argues that it had "every right to expect that Turkmenistan would appoint an entity that was capable and willing to participate in the arbitration and pay any awards because that is what the agreement required." *Id.*, at 14. In support of this contention, Plaintiffs quote from Article XXIX of the JVA, entitled "Assignment" which states: "[i]f for any reason Turkmenian Party is unable to fulfill its obligations under this Agreement, Turkemenian Party shall transfer its interest in the Agreement to a legal entity appointed by the Government of Turkmenistan that is capable and agreeable to fulfill Turkmemian Party's obligations under this Agreement." (Instrument No. 115, Tab 7, at art. 29.5). According to the JVA, Turkmenneft's contribution was principally of its right to exploit the Hydrocarbons in the Agreement Area, together with its facilities and equipment used for that purpose. (Instrument No. 115, Tab 7, at arts. 4.3, 14.1). Bridas was required to provide the necessary funds, including the advance of Turkmenneft's share of expenses which Bridas would recoup from Turkmenneft's share of JVK's revenue. (*Id.*, at arts. 4.3, 9.9, 10.1).

Plaintiffs assert that the Government of Turkmenistan orchestrated and determined the changes that were to be made to the Turkmenian Party's contract with Bridas, back in 1994. Plaintiffs also claim that Turkemenistan used its sovereign powers to force Bridas to capitulate and used its control

over the Turkmenian Party to get amendments to the JVA executed. Plaintiffs contend that several Turkmenistan officials also functioned as executives in the Turkmenian Party, such as Mr. Ishanov, who was the First Vice Minister of Oil and Gas and the President of what became the Turkmenian Party. *Id.*

Plaintiffs also contend that Turkmenistan prohibited JVK from exporting any crude oil or oil products so as to force a renegotiation of the JVA. (Instrument No. 112, at 40). Plaintiffs assert that not only did the Government bar the exportation of oil, it also prevented the import of products needed to maintain the wells, thus requiring wells to be shut down. *Id.*, 41. Plaintiffs claim that the takeover and seizure [of the JVK] that ensued was performed by officials of The Government of Turkmenistan and the Turkmenian Party acting in unison. *Id.*, at 43. Ultimately, Plaintiffs claim that the Government instructed Turkmenneft "to take over JVK and seize its assets." *Id.*, at 42. Thus, Plaintiffs insist that "from the inception of the JVK to its destruction, the Turkmenian Party was required to implement the dictates of the President, the Ministry of Oil and Gas, and the Cabinet of Ministers." (Instrument No. 112, at 43).

According to Plaintiffs, "Bridas agreed to a bargain that included a commitment by the Turkmenian government to see that the promises of the joint agreement would be fulfilled. (Tab 7 at art. 29.5). Either The Government of Turkmenistan meant what it said (in which case it should be held to its agreement) or the entire JVA was part of a fraudulent scheme to have Bridas fund the development of the Keimir wells and then divert the fruits of that investment into the government's coffers. In either case, Plaintiffs allege that equity demands that The Government of Turkmenistan pay the arbitration awards." (Instrument No. 129, at 15).

As explained in *Berger* v. *Columbia Broadcasting System, Inc.*, 453 F.2d 991 (5th Cir.), "one of the principal pur-

poses for which the law has created the corporation" is to give it an existence separate and distinct from its stockholders, thus giving them an opportunity to limit their personal liability. *Id.* at 994. "The alter ego doctrine and piercing of the corporate veil are truly exceptional doctrines, reserved for those cases where the officers, directors or stockholders utilized the corporate entity as a sham to perpetuate a fraud, to shun personal liability, or to encompass other truly unique situations." *In re Multiponics Inc.*, 622 F.2d 709, 724-25; *Cf. Joslyn Manufacturing Co.* v. *T. L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir. 1990) ("Veil piercing should be limited to situations in which the corporate entity is used as a sham to perpetrate a fraud or avoid personal liability."). "Our cases are clear that one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying alter ego theory to pierce the corporate veil." *Jon-T*, 768 F.2d at 691. "While complete domination of the corporation is the key to piercing the corporate veil, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward the party seeking piercing is required." *American Fuel Corp.* v. *Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997).

The Fifth Circuit has held that there must be a "showing that the subsidiary was used by the parent for fraud or injustice." *Edwards Co.* v. *Monogram Industries, Inc.*, 730 F.2d 977, 983-984 (5th Cir. 1984). The showing of fraud that must be made is a showing that defendant's domination, with respect to the specific transaction at issue, was used to perpetrate a fraud against the plaintiff. *American Fuel Corp.*, 122 F.3d at 134.

In this case, the principle transaction at issue, described by both Bridas and the arbitration panel, was the Government's November 1995 ban on exports. The arbitration panel found the Government liable for the Plaintiffs' damages, arising out of that action, when it stated that:

> The Claimants seek a declaration that the conduct of the respondents and the Government is repudiatory. . . . The Government banned exports of JV Keimir's products and although ostensibly the ban was lifted, in fact, no exports have been allowed to occur. . . . This state of affairs has persisted since November 1995. . . . On the facts, it is clear that the conduct of [Turkmenneft] and the Government was repudiatory and we so conclude.

(Instrument No. 119, at 22).

Thus, the arbitration panel's finding of liability of the Government rested with their belief that the Government was a party to the JVA and repudiated that agreement because of the levying of the export ban. (Instrument No. 120, Exh. 4, at 608). The Fifth Circuit has clearly found that the Government was not a party to the contract thus they can not directly repudiate the JVA. Liability can only be found against them if this Court finds that Turkmenneft is the alter ego of the Government, thus warranting the piercing of the corporate veil.

In November 1995 JVK was prevented from exporting by the Government's exercise of sovereign control of Turkmenistan's borders, not through governmental control of Turkmenneft. Even after extensive briefing, the Government has failed to assert or demonstrate that the export ban was not directed solely at JVK, and used as a tool to force Bridas to acquiesce to the financial demands that would ultimately benefit the Government. Plaintiffs have shown that the Government used their sovereign power and alleged separateness from Turkmenneft to harm Bridas and commit an injustice against them. In this Court's view this is one of those "truly unique situations" where the parent, in this case the Government used its sovereign power to control its borders to effect a wrong against Bridas and then shunned personal liability. Accordingly, the Court finds that Plaintiffs have shown how the Government used its sovereign powers and its relation-

ship with Turkmenneft to attempt to defraud Bridas in the JVK joint venture.

B.

Since Bridas has made a sufficient showing of injustice, the Court will analyze whether the Government had complete control over Turkmenneft or they had an independent existence. The Court in *Bancec* outlined the features it attributed to an ordinary, separate, government instrumentality.

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. [footnote omitted].
>
> These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. [footnote omitted] These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial

resources needed to make large-scale national investments.

Id. at 624-25; *Hester International Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170,178 (5th Cir. 1989).

1.

The Court will first review the "formalities" factors, which include: whether the parent and subsidiary have common stock ownership; whether the parent and subsidiary have common directors or officers; whether the parent and subsidiary have common business departments; whether the parent caused the incorporation of the subsidiary; whether the entity has the authority to sue and be sued in its own name; whether the subsidiary does not observe corporate formalities; and whether the entity has the right to hold and use property.

It is undisputed that the Government caused the incorporation of Turkmenneft and that Turkmenneft is wholly owned by the Government. (Instrument No. 119, at 25). The parties differ on the issue of common business departments. Plaintiffs contend that several individuals held concurrent positions in the Government and in Turkmenneft. Plaintiffs also contend that there was a pattern of promoting individuals within the Government and also making them executives in Turkmenneft. (Instrument No. 112, at 25). Plaintiffs argue that the overlap at the level of officer is substantial, thus the record supports a finding that there were "common directors or officers" between them. (Instrument No. 112, at 29).

Plaintiffs argue that communications regarding the JVK were issued to Bridas on Government letterhead, and that letters were signed by individuals asserting two capacities, for example, Minister of State and executive of Turkmenneft. *Id.*, at 25-26. Plaintiffs contend that disrespect for corporate formalities is reflected by the Government's effectively

usurping Turkmennefts' "place by negotiating, and sometimes even signing, vital amendments to the JVA." *Id.*, at 31. Bridas alleges that officials of The Government of Turkmenistan participated in JVK board meeting dealing with the day-to-day affairs of the JVK, such as approving budgets, contracts and production programs, and participating in discussion of JVK staff. *Id.*, at 38. According to Bridas, the "Ministry made regular and ongoing demands for production, sales, investment, export and accounting data, addressed directly to JVK rather than through the Turkmenian Party." *Id.* Plaintiffs contend that the Government's involvement in JVA negotiations and JVK board meetings establishes The Government of Turkmenistan's domination and control of Turkmennefts' daily operations. (Instrument No. 129, at 6).

The Government contends that there was no overlap of departments. The Government of Turkmenistan admits that there was minor overlap between executives, however it does not justify piercing the veil. Specifically, The Government of Turkmenistan argues that Bridas' reliance on the asserted overlap of two individuals, Mr. Ishanov and later Mr. Kulniyazov, between Turkmenneft and the Ministry of Oil & Gas is overblown. According to the Government, Bridas failed to recognize that in Mr. Ishanov's case, he left his position as Deputy Minister and as Chairman of the Turkmenian Party when he received his promotion to Minister in July 1994. The Government concedes that Mr. Kulniyazov did simultaneously hold the "status as Chairman of Turkmenneft and State Minister," however, the Government asserts that the "entity's participation in the transaction at issue in this case [the JVK] was through employees who were not even officials of the parent Government, [thus], there is no basis for piercing the veil." (Instrument No. 119, at 26). Additionally, The Government of Turkmenistan also asserts that letterhead with the state seal does not indicate common business departments between the Government, the Ministry or Turkmenneft as Bridas asserts. (Instrument No. 127, at 14).

According to the Government, the addresses for the Ministry and Turkmenneft are different and the functions they perform are different as well, although they are both connected to the Government, thus they use the seal. *Id.*, at 14-15.

Defendants also acknowledge that Turkmenneft was "created by an act of its owner," beginning with its incorporation by the Soviet Union in 1925. During the period of the JVK, Turkmenneft went through a series of re-organizations at the direction of the Government, all documented in the public records of The Government of Turkmenistan. Defendants claim that these re-organizations resulted in the consolidation or spin-off of various activities collateral to Turkmennefts' core function, oil production, which remained the same. (Instrument No. 119, at 27). Defendants also contend that Bridas acknowledged and agreed to many of these changes. Article 29.1 of the JVA itself recognized that the Turkmenian Party could transfer its obligations under the JVA to one or more entities. *Id.*, at 28.

A government-owned corporation has been held to no longer be distinguishable as a separate entity when the majority of the instrumentality's stock has been expropriated, the government had required that all checks in excess of a certain amount be signed by a government-appointed director, a governmental agency was required to approve all invoices for shipments exceeding a certain amount, and the government generally exercised direct control over its operation. Essentially, the subsidiary is not independent, when the government has assumed day-to-day operation of the instrumentality which it owns. *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) (held that 100% ownership alone was insufficient to overcome the presumption of separate juridical existence); *Hester International Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989)

In this case, the Turkmenneft's legal status was explicitly recognized on the face of the JVA. The JVA defines the Turkemenian Party, predecessor to Turkmenneft as "a legal entity within the meaning of the laws of Turkmenistan." (Instrument No. 119, at 18; art. 28.9 JVA). Turkmeninian law consistently establishes Turkmenneft's legal separation from the Ministry of Oil and Gas and the Government, and asserts that Turkmenneft is solely responsible for its own obligations. *Id.*, at 18-19. In addition, Turkmenneft has existed as a juridical entity long before the events in question and the record establishes that Turkmenneft and its predecessors had the right and did actually hold and use property. (Instrument No. 115, Exh. 38, at ARB001076 (Charter for the State Concern of Turkmenneft)). Additionally, based on this case, it is clear that Turkmenneft can sue and be sued in its own name.

Although the Government was the sole shareholder of Turkmenneft, and there may have been some overlap of executives, and the influence of Government officials at JVK Board meetings, Plaintiffs have not shown the Court that the Government was involved in the day-to-day activities of Turkmenneft or the JVK. *Hester International Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir. 1989) (two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the juridical entities). Accordingly, the Court concludes that the Government and Turkmenneft did observe the corporate formalities.

2.

A review of the "finances" factors include, whether: the parent and subsidiary file consolidated financial statements; the parent finances the subsidiary; the subsidiary operated with grossly inadequate capital; the parent pays salaries and other expenses of subsidiary; and others pay or guarantee

debts of the dominated corporation; and the source of the entity's funding.

Plaintiffs assert that not only was the Turkmenian Party financed by the Government, when the Government created Turkmenneft as the Turkmenian Party's successor, the Government grossly undercapitalized the "entity with authorized capital of only 40.5 million manat, a sum representing a mere $17,000 in [US] 1996 dollars." (Instrument No. 112, at 28). Plaintiffs also assert that neither Turkmenneft, nor any of its predecessors have produced financial statements of any kind, either as part of their participation in the JVK or in the arbitral proceedings. *Id.*, at 29. Plaintiffs also allege that Turkmennefts' revenues went to a State Fund that also collected revenues from other state-owned entities. Bridas argues that it necessarily follows that the salaries and expenses of Turkmenneft were paid by the Government. *Id.*, at 35. Additionally, Plaintiffs assert that Turkmenneft's arbitration expenses were paid from the State Fund, and not from an independent Turkmenneft account. *Id.*

The Government asserts that "[s]ince the Government and Turkemnneft are not U.S. public companies required to report their finances, consolidation of their financial statements has little meaning." (Instrument No. 119, at 29). The Government of Turkmenistan contends that Turkmenneft has had its own independent balance sheet since 1992 as required by the Charter of Production Association Turkmenneft. However, the Court notes that the Government does not include any examples of a financial statement or balance sheet for Turkmenneft or its predecessors. The Government also argues that Turkemenneft's contribution to the JVK was not financial, but it did offer and Bridas did accept its contribution of the rights to exploit the hydrocarbons in Keimir as well as the entire existing infrastructure in the area. Additionally, the Government claims that the employees working for the JVK were paid by the JVK not by the Government. *Id.*, at 30.

A review of the financial factors demonstrates that Turkmenneft was not financially independent from its parent. In this Court's view, there was a lack of separate accounting and responsibility between the two entities. Consequently, the Court finds that the record demonstrates that Turkmenneft was not financially separate from the Government. The Court finds that the record reflects that the Government used the lack of separateness to commit a fraud or another wrong on Plaintiffs.

3.

The Court's analysis of the "operations" factors include whether: the parent and subsidiary have common business departments; the subsidiary receives no business except that given by the parent; the parent uses the subsidiary's property as its own; the daily operations of the two corporations are not kept separate; the directors of the "subsidiary" act in the independent and primary interest of the "parent"; the alleged dominator deals with the dominated corporation at arms length; state statutes and case law view the entity as an arm of the state; the entity's degree of local autonomy; and the entity is concerned primarily with local, as opposed to statewide, problems.

Bridas argues that The Government of Turkmenistan not only negotiated and approved the initial joint venture agreement, but also directly negotiated all subsequent amendments. (Instrument No. 129, at 6). Plaintiffs also contend that Turkmenneft regularly used joint letterhead bearing the state seal of The Government of Turkmenistan and showing common business departments. In addition, Plaintiffs allege that Turkmenian government officials who were also officers of the Turkmenneft signed documents in their dual capacities. Bridas contends that in 1991 the Turkmenian Party was characterized in the bidding documents as an "arm" of The Gov-

ernment of Turkmenistan.[2] Plaintiffs argue that the JVA itself provides that the function of Turkmenian Party was to represent the "interests, rights and obligations" of The Government of Turkmenistan and according to Bridas "conferred upon the Turkmenian Party a massive bundle of powers that are inherent to sovereign states and normally exercised only by their governments." (Instrument No. 112, at 31). Bridas concludes that the record shows that whatever corporate identity Turkmenneft might purport to have on any given date, it was at all times an "arm" of the State in the exact sense in which that term is used in the law of alter ego. *Id.*

Plaintiffs unequivocally assert that "[a]t no time did Turkmenneft (or its predecessors as Turmkenian Party) ever have any business other than that specifically conferred upon it by Turkmenistan." (Instrument No. 112, at 35). Bridas also claims that the Government had use of Turkmenneft's property. Plaintiffs allege that as a matter of law, Turkmenneft was required to use its property and conduct its activities as instructed by the Ministry of Oil and Gas, which in turn had to implement the instruction of the President. *Id.*, at 3. However, the Court notes that Plaintiffs give no support, in the form of a cite, for this claim.

Defendants claim that before and after the JVA, Turkemenneft executed agreements with other international entities, including Peteronas of Malaysia. (Instrument No. 119, at 31). The Government traces Turkmenneft's origins back to 1925, as discussed *supra*, therefore, Turkemenistan contends that Turkmenneft was a longstanding, substantial entity, op-

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[2] The Court notes that Plaintiffs cite to a January 1991 Conference held to announce the competitive bidding for joint exploration, development and production rights in what is now Turkmenistan. The conference was held in Russian and the translation of the meeting, cited by Plaintiffs admits that there was difficulty in the simultaneous translation. (Instrument No. 115, Exh. 3, at 6522-21).

erating separately from the Government. *Id.* In addition, the Government refers to Chelekenmorneftegaz, a joint venture between the Dutch company Larmag and Turkmenneft's predecessor. Therefore, Turkministan argues that the arrangements with foreign parties show that the Government was not Turkmenneft's only source of business. *Id.* According to the Government, Bridas' control of JVK extended to all aspects of JVK's management. Specifically, the Director General of JVK was required to present the JVK Board, made up of two representatives from Turkmenneft and two representatives from Bridas, with programs and budgets for "approval." However, approval did not require a unanimous vote. (Instrument No. 119, at 33). The Director General was empowered to "operationally direct the work of the Joint Venture in accordance with the Programs and Budgets," and "conduct all kinds of transactions and perform legal acts," and "perform any other action necessary to achieve the purposes of the Joint Venture." *Id.*, at 33. As the arbitrators summarized, "[Bridas] tended to run the project as their own fiefdom, which to some extent by the terms of the JV Agreement, it was." (Instrument No. 120 Exh. 4, FPA at 44).

The Government also asserts that the minutes of the Board meetings reflect that Turmkmenneft's representatives on the Board consistently voted in favor of proposals advanced by Bridas from the inception of the Joint Venture, until the Government's export ban in November 1995. (Instrument No. 119. at 33). The Government recites two examples of instances where the Board responded to requests or suggestions made by the Government which were not adopted, but were politely refused, during the approximately two year relationship between Turkmenneft and Bridas involving the JVK. *Id.*, at 34-35.

In addition, the Government argues that Bridas confuses a ministry's official participation in JVK with participation in Turkmenneft, an entirely different legal entity. (Instrument No. 127, at 18). According to the Government, Mr. Kulniya-

zov's participation in a 1993 JVK board meeting was as the then President of the Turkmenian Party, an invited guest to the meeting, as were certain Bridas officials. During that meeting the Government asserts that the minutes reflect that Mr. Kulniyazov actively helped promote JVK's interest against the stated interest of the Government or Ministry. Similarly, the minutes of a July 1995 meeting, at which Mr. Kulniyazov was also present, was labeled as a meeting "between the parties [Bridas and Turkmenneft] and the Board of Directors." (Instrument No. 127, at 19). Thus, according to the Government, maintaining the separation between Turkmenneft and the Ministry or Government. *Id.*

The Government also disputes Bridas' assertion that Turkemenistan "conduct[ed] all" the JVA negotiations. According to the Government, Bridas freely agreed to execute the JVA with Turkmenneft alone. In fact, The Government of Turkmenistan asserts that JVK rebuffed the August 1994 suggestion by Mr. Ishanov that JVK include the Ministry of Oil & Gas in their discussions with the Turkmenian Party. (Instrument No. 127, at 19).

As the Court noted *supra*, Turkmenneft was not created for the special purpose of entering into the JVA with Bridas. For over 70 years previous governments have created entities to be responsible for the oil production across Turkmenistan. Turkmenneft is albeit a closely held subsidiary, demonstrated by how the Government is continuously changing the name of the organization and by how the Government used its sovereign powers to force Bridas to give Turkmenneft a financial advantage which would ultimately benefit the Government. Based on the actions of the Government, the Court finds that the Government did not really deal with Turkmenneft at arms length. However, Turkmenneft does have some measure of independence and the ability to run its own affairs as shown by its attempts to convince the Government to relinquish the export ban and its siding with Bridas on other Board issues, as well as Turkmenneft's

relationship with other international entities involved in oil production. Therefore, the Court finds that Turkmenneft was operationally separate from the Government.

Bridas quotes this Court as concluding "that although Turkmenistan did not officially sign the joint venture agreement it controlled the decisions made by the signatory, Turkmenneft." (Instrument No. 129, at 10). Bridas also quotes the Fifth Circuit, which stated that "Bridas has set forth ample evidence regarding the extent to which Turkemenneft was controlled by the Government *subsequent* to the signing of the JVA." (Instrument No. 111, at 18) (emphasis in original). Plaintiffs contend that both courts conclusions are supported by the record and "is the law of the case because both the Court of Appeals and this Court have expressly decided the question of control in favor of Bridas." (Instrument No. 129, at 10). The "law of the case" doctrine provides "that a decision of a factual or legal issue by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court." *Lyons* v *Fisher*, 888 F.2d 1071, 1074 (5th Cir. 1989) (quoting *Goodpasture, Inc.* v. *M/V Pollux*, 688 F.2d 1003, 1005).

The Fifth Circuits' statement that the Government controlled its subsidiary was in reference to the doctrine of agency not alter ego. (Instrument No. 111, at 18). As the Fifth Circuit has explained, the principles involved in the two doctrines are entirely different. *Id.*, at 19. While this Court did conclude that "the evidence shows that Turkmenneft was controlled by the government of Turkmenistan." (Instrument No. 97, at 17). This Court also found that there was no absence of corporate formalities and that there was no indication of an intermingling of corporate finances and directorship. In addition, as the parties are aware, the Fifth Circuit remanded this issue for this Court to analyze in the "totality of the circumstances." Thus, neither court "clearly and expressly decided the question" of control in regards to

the doctrine of alter ego, therefore, Bridas' reliance on the "law of the case" doctrine is misplaced.

The Sovereign immunity factors, such as issues of local autonomy and local problems are largely inapplicable in this context since for Eleventh Amendment purposes, limited territorial boundaries suggest an entity is not an arm of the state as a whole. *Perez* v. *Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 330 (5th Cir. 2002) ("Frequent and broad oversight by the state suggests that the entity is an arm of the state."). To the extent that these factors bare on Turkmenneft's operational and managerial control in the transaction at issue, in this case, the parties have addressed it within the scope of operations.

As the Fifth Circuit has noted, "[a]lter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions. No single factor is determinative. This should be apparent from the extensive list of circumstances that courts have developed to guide alter ego determinations. *Sapic* v. *Gov't of Turkm.*, 345 F.3d 347, 359 (5th Cir. 2003) (citations omitted). Assessing the relationship between a parent and its subsidiary is not a simple task and it involves a significant number of factors and assessments.

In this case, Bridas has demonstrated that the Government was heavily involved with its subsidiary, Turkmenneft. However, as the Fifth Circuit has held, even if the parent and subsidiary "are closely tied through stock ownership, shared officers, financing arrangements, and the like. . . . this alone does not establish an alter-ego relationship. As we explained in *Jon-T Chemicals, Inc.*, there must be evidence of complete domination by the parent." *Gardemal* v. *Westin Hotel Co.*, 186 F.3d 588, 593 (5th Cir. 1999). In this case, there is an insufficient showing of complete domination or extensive control so as to warrant a finding that Turkmenneft was the alter ego of the Government of Turkmenistan.

IV.

Based on the foregoing, the Court finds that the arbitration panel lacked jurisdiction to bind the Government to the arbitration or find liability against the Government. Therefore, the Court GRANTS the Renewed Motion of Government of Turkmenistan to Vacate the Arbitration Awards (Instrument No. 119).

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 10th day of September, 2004, at Houston, Texas.

/s/

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIDAS SAPIC; Bridas Energy International Ltd;
Intercontinental Oil & Gas Ventures Ltd;
Bridas Corp, Plaintiffs-Appellants

v.

GOVERNMENT OF TURKMENISTAN,
Concern Balkannebitgazsenagat and State Concern
Turkmenneft, Defendants-Appellees.

No. 04-20842

[Filed May 22, 2006]

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 4/21/06, 5 Cir., 447 F.3d 411)

Before JONES, DeMOSS, and OWEN, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____

EDITH H. JONES
UNITED STATES CIRCUIT JUDGE